Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. ____

In The
Supreme Court of the United States

DONALD C. FLEMING and
WILLIAM ALLEN ARNOLD,
Defendants-Appellants-Petitioners,
PRO SE, NO ATTORNEYS,
ASSERTING A RIGHT OF
SELF-REPRESENTATION

v.

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Respondent

ON RULE 11 PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ORIGINAL RULE 11 JOINT PETITION FOR WRIT OF CERTIORARI

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Questions on Appeal (Discretionary Review)

1. What does *defraud* mean?

2. Does 18 U.S.C. § 371 (defraud) alter that definition?

3. Under the present reorganization, do substantive and procedural due process still exist?

4. Is a Klein conspiracy, by this or any other of its wordings, statutory?

5. Where the executive authority purports to create the "criminal" "statute," is there a violation of separation of powers?

6. Does a non-statutory charge carry any "lesser included's" with it?

7. Does Plaintiff–Appellee–Respondent have standing to complain of matters defined, in whole or in part, by 18 U.S.C. § 371?

8. Can joinder ever occur with a party that lacks standing?

9. When is joinder "final?"

   A. Where there's a plea, and where threshold and apparent joinder of issue follows from mistake of fact, may that mistake be corrected at allocution?

   B. If the signing of the "plea agreement" is the (last) time to "object or waive" regarding joinder, does joinder exist where the "agreement" is (facially) self-breaching?

   C. Where there's a trial, and where threshold and apparent joinder of issue follows from mistake of

fact, may that mistake be corrected as late as allocution, or is joinder irrebuttably resolved at the start of trial?

D. Is disclaimer, arising from asserting the preference for extinguishment as distinct from discharge, a matter of venue or personal jurisdiction, i.e, subject to threshold waiver or estoppel, thus a waste of time to raise thereafter, or of subject matter jurisdiction?

10. Does an indictment that charges criminally the non-payment of FICA or FUTA seek to reinstate "debtor's prison?"

11. Under *Erie* and the proprietorship doctrine, as they pertain to the special maritime and territorial jurisdiction,

    A. does federal public trust policy preempt state public trust policy, for purposes of any of 28 U.S.C. § 3002(15)(a), (b) or (c), outside an area that qualifies under 40 U.S.C. §§ 255, 3111 or 3112?

    B. if part A is answered in the negative, even where the forum is proper, and even where the benefits exist from both public trusts, and even where something substantial moves in commerce so as to satisfy 18 U.S.C. § 8, doesn't the choice of law analysis still favor the state public trust policy, *especially* for an indictment?

    C. even if that state's public policy doesn't apply, doesn't a "taxpayer" have access to the State's original statutory law and common law via 28 U.S.C. § 1333(1) (saving to suitors)?

12. Under Federal Rule of Criminal Procedure 11 ("Rule 11"), is a plea properly set aside where the "plea agreement" is (facially) self-breaching?

13. Under Rule 32(e), is a plea properly set aside where the "plea agreement"

    A. charges usurious interest?

    B. seeks to reinstate "debtor's prison?"

    C. charges *defrauding* but establishes not one penny's worth of property "wrongfully *acquired*?"

    D. seeks to impose sentence upon (*multiple*) allegedly *dismissed* counts?

    E. if there is a lesser included offense in Count One, at all,

        1. confirms, by its own terms, the wholesale and perpetual onslaught of fiduciary abuse?

        2. asserts a claim sounding in trust, but fails even to allege, much less prove, any beneficiary?

        3. attributes to an individual "gross income" that is not any individual's, but rather is that of an unindicted entity?

        4. holds as liable an alleged "responsible party" where no threshold liability in any entity is even alleged, much less proved?

        5. fails to establish any "tax deficiency" in any individual?

6. fails to establish any set of convictions to satisfy the term "corruptly?"

7. asserts and confirms a position so inconsistent with the presumed role as to amount to disclaimer?

F. arises from the same mistake of fact resulting from ignorance of the law that applies to the case, generally?

14. Can the advisory panel's opinion be sustained where there is no evidence of

A. defrauding (wrongful *acquisition*)?

B. "tax deficiency"
1. in any business entity?
2. in any individual?

15. Can the advisory panel's opinion be sustained where the definition of *defraud* in the charge is not the proper definition?

16. Does the "judgment" that orders no restitution confess, judicially, the complete absence of any *defrauding*?

17. Where there is no § 7201 (*payment*) case (for there is no assessment), is there any authority for any payment mandamus?

18. Where there is a "plea agreement," can a "judgment" stand, where the Counts that form the basis for the "judgment" are the very same as those agreed to be dismissed?

19. Where there is a trial, can a "judgment" stand, where the Counts that form the basis for the "judgment"

were dismissed and never tried?

20. Can a "judgment" stand, where the indictment charges the party as a conspirator but he is sentenced as a principal?

21. Can either one of two related "judgments" stand, where, between them, they charge "double taxation?"

22. Can either one of two related "judgments" stand, where, between them, they create "simultaneous double jeopardy?"

Parties

Service is made on the Solicitor General, with whom it shall be a privilege to work through this matter, per Rule 29.4, as the authorized agent in relation to this forum for all of the following interested or potentially interested parties:

United States Court of Appeals for the Eleventh Circuit, generally
(Re: Case Nos. [Fleming–same case] 03-12283-D, 03-12283-DD,* 03-12283,** [Arnold–same case] 03-12810-D, 03-12810-DD,* 03-12810**)
56 Forsyth Street, N.W.
Atlanta, Georgia 30303
Thomas K. Kahn, Clerk

United States District Court for the Middle District of Florida, generally
(Re: Docket Nos. 3:00-cr-262-J-20HTS, 3:00-cr-262-J-20A)
300 North Hogan Street, Suite 9-150
Jacksonville, Florida 32202
Sheryl L. Loesch, Clerk

United States (UNITED STATES)

United States of America (UNITED STATES OF AMERICA)

Government of the United States (GOVERNMENT OF THE UNITED STATES)

United States Government (UNITED STATES GOVERNMENT)

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* A result of inadvertent non-territorial recognition

** A result of "overruling" the reservation of defenses that followed from the first modification. (The courts and clerks have shown great patience.)

Federal Government (FEDERAL GOVERNMENT)

government of the District of Columbia (GOVERNMENT OF THE DISTRICT OF COLUMBIA)

Additional parties.
On appeal from this same indictment:

Joseph Evans (presently, the same case on appeal as Arnold)
Michael Bloomquist (separate trial, separate case on appeal)

Subject to same matter, but separated from the indictment and not on appeal:

Joyce Fleming (a recent mild heart attack patient)

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Appendix A (Fleming) (very same Appendix A as with the Writ of Mandamus)

Appendix B (Arnold) (very same Appendix B as with the Writ of Mandamus)

(References to 1 App., 2 App., 3 App. and 4 App. are references to the Appendices filed in the 11th Circuit.)

Citations to decisions below: None

Jurisdiction

(i) Order regarding Fleming, dated 15 December A.D. 2003;
Failure of "good behavior" release regarding Arnold, as of approximately 15 February A.D. 2004.

(ii) No Order on rehearing applicable

(iii) NA

(iv) 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(c); per Rule 11, 28 U.S.C. § 2101(e); appellate court jurisdiction via 28 U.S.C. §§ 1291, 1294(1) and 18 U.S.C. § 3742.

(v) No "constitutional" questions.

Statutory Provisions Relevant to Certiorari

Title 18

Section 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371 (2000).

Federal Rules of Criminal Procedure

Rule 11. Pleas

(a) Alternatives.

(1) *In general.* A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) *Conditional pleas.* With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of

any specified pretrial motion. A defendant who prevails on appeal he shall be allowed to withdraw the plea.

(b) Nolo contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right

against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea agreement procedure.

(1) *In general.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) *Notice of such agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) *Acceptance of a plea agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a plea agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity

to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of plea agreement procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of pleas, plea discussions, and related statements.* Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath,

on the record, and in the presence of counsel.

(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

FED. R. CRIM. P. 11.

Rule 32. Sentence and Judgment

(a) In general; time for sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence investigation and report.

(1) *When made.* The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.

(2) *Presence of counsel.* On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) *Nondisclosure.* The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) *Contents of the presentence report.* The presentence report must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to

the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence—within or without the applicable guideline—that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) in appropriate cases, information sufficient for the court to enter an order of restitution;

(G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(H) any other information required by the court.

(5) *Exclusions.* The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and objections.

(A) Not less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same

time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) Sentence.

(1) *Sentencing hearing.* At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) *Production of statements at sentencing hearing.* Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) *Imposition of sentence.* Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court—in lieu of making that information available—must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

(4) *In camera proceedings.* The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear

in camera the statements—made under subdivision (c)(3)(B), (C), (D), and (E)—by the defendant, the defendant's counsel, the victim, or the attorney for the Government.

(5) *Notification of right to appeal.* After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

(d) Judgment.

(1) *In general.* A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) *Criminal forfeiture.* When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

(e) Plea withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(f) Definitions. For purposes of this rule—

(1) "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by—

(A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or

(B) one or more family members or relatives designated by the court if the victim is deceased or incapacitated;

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

(2) "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code [18 USCS §§2241 et seq.].

FED. R. CRIM. P. 32

Section 13. Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Common-wealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted

within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b)(1) Subject to paragraph (2) and for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

(2)(A) In addition to any term of imprisonment provided for operating a motor vehicle under the influence of a drug or alcohol imposed under the law of a State, territory, possession, or district, the punishment for such an offense under this section shall include an additional term of imprisonment of not more than 1 year, or if serious bodily injury of a minor is caused, not more than 5 years, or if death of a minor is caused, not more than 10 years, and an additional fine under this title, or both, if—

(i) a minor (other than the offender) was present in the motor vehicle when the offense was committed; and

(ii) the law of the State, territory, possession, or district in which the offense occurred does not provide an additional term of imprisonment under the circumstances described in clause (i).

(B) For the purposes of subparagraph (A), the term "minor" means a person less than 18 years of age.

(c) Whenever any waters of the territorial sea of the United States lie outside the territory of any State, Commonwealth, territory, possession, or district, such waters (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) shall be deemed, for purposes of subsection (a), to lie within the area of the State, Commonwealth, territory, possession, or district that it would lie within if the boundaries of such State, Commonwealth, territory, possession, or district were extended seaward to the outer limit of the territorial sea of the United States.

18 U.S.C.S. § 13 (Supp. 2003).

§ 3563. Conditions of probation

(a) Mandatory conditions. The court shall provide, as an explicit condition of a sentence of probation—

(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation;

(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13), unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under subsection (b);

(3) for a felony, a misdemeanor, or an infraction, that the defendant not unlawfully possess a controlled

substance;

(4) for a domestic violence crime as defined in section 3561(b) by a defendant convicted of such an offense for the first time that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant;

(5) for a felony, a misdemeanor, or an infraction, that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant;

(6) that the defendant—

(A) make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and

(B) pay the assessment imposed in accordance with section 3013;

(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments;

(8) for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994 [42 USCS § 14071(a)(3)]); and

(9) that the defendant cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [42 USCS § 14135a].

If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

18 U.S.C.S. § 3563(a) (2001).

§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim"

means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C.S. § 3663A (2001).

Internal Revenue Code

Section 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

IRC § 7201.

Section 7212(a). Attempts to interfere with administration of internal revenue laws

(a) Corrupt or forcible interference

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

IRC § 7212(a) (Source–16 Aug 1954, ch. 736, 68A Stat. 855). *Cf. Klein*, 247 F.2d at 910-11 (superceding indictment 17 Sep 1954).

Title 28

§ 3002. Definitions

As used in this chapter:

(1) "Counsel for the United States" means—

(A) a United States attorney, an assistant United States attorney designated to act on behalf of the United States attorney, or an attorney with the United States Department of Justice or with a Federal agency who has litigation authority; and

(B) any private attorney authorized by contract made in accordance with section 3718 of title 31 to conduct litigation for collection of debts on behalf of the United States.

(2) "Court" means any court created by the Congress of the United States, excluding the United States Tax Court.

(3) "Debt" means—

(A) an amount that is owing to the United States on account of a direct loan, or loan insured or guaranteed, by the United States; or

(B) an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond

forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States; and includes any amount owing to the United States for the benefit of an Indian tribe or individual Indian, but excludes any amount to which the United States is entitled under section 3011(a).

(4) "Debtor" means a person who is liable for a debt or against whom there is a claim for a debt.

(5) "Disposable earnings" means that part of earnings remaining after all deductions required by law have been withheld.

(6) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(7) "Garnishee" means a person (other than the debtor) who has, or is reasonably thought to have, possession, custody, or control of any property in which the debtor has a substantial nonexempt interest, including any obligation due the debtor or to become due the debtor, and against whom a garnishment under section 3104 or 3205 is issued by a court.

(8) "Judgment" means a judgment, order, or decree entered in favor of the United States in a court and arising from a civil or criminal proceeding regarding a debt.

(9) "Nonexempt disposable earnings" means 25 percent of disposable earnings, subject to section 303 of the Consumer Credit Protection Act.

(10) "Person" includes a natural person (including an individual Indian), a corporation, a partnership, an unincorporated association, a trust, or an estate, or any other public or private entity, including a State or local government or. an Indian tribe.

(11) "Prejudgment remedy" means the remedy of attachment, receivership, garnishment, or sequestration authorized by this chapter to be granted before judgment on the merits of a claim for a debt.

(12) "Property" includes any present or future interest, whether legal or equitable, in real, personal (including choses in action), or mixed property, tangible or intangible, vested or contingent, wherever located and however held (including community property and property held in trust (including spendthrift and pension trusts)), but excludes—

(A) property held in trust by the United States for the benefit of an Indian tribe or individual Indian; and

(B) Indian lands subject to restrictions against alienation imposed by the United States.

(13) "Security agreement" means an agreement that creates or provides for a lien.

(14) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, or any territory or possession of the United States.

(15) "United States" means—

(A) a Federal corporation;

(B) an agency, department, commission, board, or other entity of the United States; or

(C) an instrumentality of the United States.

(16) "United States marshal" means a United States marshal, a deputy marshal, or an official of the United States Marshals Service designated under section 564.

28 U.S.C. § 3002 (2000).

Title 31

Section 321. General authority of the Secretary

(d)(1) The Secretary of the Treasury may accept, hold, administer, and use gifts and bequests of property, both real and personal, for the purpose of aiding or facilitating the work of the Department of the Treasury. Gifts and bequests of money and the proceeds from sales of other property received as gifts or bequests shall be deposited in the Treasury in a separate fund and shall be disbursed on order of the Secretary of the Treasury. Property accepted under this paragraph, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gift or bequest.

(2) For purposes of the Federal income, estate, and gift taxes, property accepted under paragraph (1) shall be considered as a gift or bequest to or for the use of the United States.

Section 5101. Decimal system

United States money is expressed in dollars, dimes tenths, cents or [hundredths], and mills or thousandths. A dime is a tenth of a dollar[;] a cent is a hundredth of a dollar, and a mill is a thousandth of a dollar.

31 U.S.C. § 321(d); 31 U.S.C.S. § 5101 (1996).

Statement of the Case

See also "Statement of the Case" from their joint petition for mandamus.

Even Klein didn't commit a Klein conspiracy!

There's a huge difference between "larceny by trick" (wrongful *acquisition*) and "embezzlement" (wrongful *detinue*, wrongful *continued* possession). It is inconceivable how an "income tax" fact pattern, which sounds in "embezzlement," is even remotely cognizable under a "larceny by trick" (defrauding) legal theory. And, where there is no *defrauding*, there can be no conspiracy to *defraud*.

There is no statutory definition of a Klein conspiracy, which is not even a "common law" crime, much less a "federal common law" crime. If the Klein conspiracy language is "authority," then the "experiment in democracy" in this state became a dictatorship 50 years ago when the executive started defining crimes.

No facts support either Fleming's "plea agreement" or Arnold's advisory panel opinion. The prosecution's definition for *defraud* is facially flawed.

"Sentencing" is a ramshackle spectacle! Both were charged as conspirators but sentenced as principals. Further, there being no pleading or evidence of *defrauding*, "sentencing" is based on DISMISSED counts, non-existent charges, charges created during sentencing, fabricated and incompetent numerics, mere "debt" (i.e., "debtor's prison"), "double taxation," and simultaneous double jeopardy.

Fleming's complete loss of meaningful access to the appellate court jeopardizes both his appeal and Arnold's, for the cases are inextricably intertwined.

Wrong legal theory, wrong parties, no statute, no facts, illegal sentencing.

Writ of Certiorari

Remedies Requested.

TAKING JURISDICTION. Petitioners request, per Rule 11, that this Court take jurisdiction prior to a final ruling in the appellate court.

RELEASE PENDING APPEAL. As also addressed in the mandamus proceeding, Petitioners request release pending conclusion of the appellate (and any subsequent review) process.

REVERSAL OF JUDGMENT. Ultimately, Petitioners request reversal of the "judgments" against them.

Overview.

TAKING JURISDICTION. Fleming has been completely denied substantive and procedural Due Process on his direct appeal. As addressed in the related mandamus proceeding, Fleming's appointed counsel's prejudice-causing deficiencies have, so far, been "covered" by Fleming's self-initiative. But, the appellate court's denial of counsel's *second* motion to withdraw, is, to Fleming, a "final judgment." Counsel has abandoned Fleming and has *refused* to assert Fleming's defenses, objections and positions, leaving Fleming no meaningful access. To preserve his direct appeal, Fleming has no alternative remaining but to present it here, *pro se*.

Since Fleming's "plea agreement" and Arnold's trial stem from the same Count in the same indictment, and since, additionally, the "double taxation" and simultaneous double jeopardy issues directly involve and affect Fleming and Arnold, the matters are properly joined for review.

RELEASE PENDING APPEAL. Neither party should have been deprived liberty on this case from the outset. For Arnold, tricky here are the habeas corpus issues. While mandamus certainly applies, if habeas is the preferred remedy, that's fine, but here's the problem. Habeas has "no repetition" rules, and if Arnold is compelled to initiate

habeas now, for "good behavior"-based early release (he should have been released on or about 15 February A.D. 2004), prior to completion of direct appeal, then does he risk getting snared by the "no repetition" rules?

REVERSAL OF JUDGMENT. There is no such thing as a Klein conspiracy. There are no "lesser included's," whether *defrauding*, "tax deficiency" or "obstructing," by law or even by fact, individually or in conspiracy. No basis exists for loss of liberty.

Discussion.

1. What does *defraud* mean?

See joint petition for mandamus, pp. 18-19; Arnold's Brief, Points 1, 2, 4 and 7 (Fleming's Brief, Points 1, 2 and 4).

What it doesn't mean. Whatever may be the definition of *defraud*, it is rooted in the common law, meaning that the canon applies. *Neder*, 527 U.S. at 21-25; *Carter*, 530 U.S. at 264-67; *Morissette*, 342 U.S. at 250-63, in particular 260-63. Since "embezzlement" is a statutory offense, 3 WHARTON § 383 at 463-65, it follows that *defraud*, in § 371,[1] does not, and cannot possibly, mean, include or refer to "embezzlement." The "embezzlement" provision is IRC § 7201.

What it does mean. *Defraud*, as defined by its elements, is this:

(1) *acquisition*
(2) of property (rights)
(3) known by the accused to be property not owned by the accused
(4) by trick or deceit,

the proving of which actus reus typically supplies

(5) the intent to so *acquire* the property wrongfully.

See Bell, 462 U.S. at 358-60 (larceny definitions); *Haas*

[1] Arnold contrasts *defraud* in various contexts, including student loans, mail and securities. Arnold's Brief, pp. 9-19.

(exclusive use information); *Morissette* (mens rea, personal property); *Hyde*, 225 U.S. at 350-54 (land); *Dennis*, 384 U.S. at 860-62 (use of NLRB facility under false pretenses).

Jury Instruction. *See* Arnold's Brief, pp. 14-18, 42. *See* Question 15, *infra*. "To 'defraud' the United States means to interfere with or obstruct one of its lawful government functions by deceit, craft or trickery." (4 App. Instructions 7).

2. Does 18 U.S.C. § 371 (defraud) alter that definition?

What § 371 (defraud) does, and *all* that § 371 (defraud) does, is *narrow* element (2), as follows:

(2) of property (rights) *of the United States or an agency thereof.*

Section 371 does *not* turn "larceny by trick" into "embezzlement." It limits "larceny by trick" to property *of the United States or an agency thereof.*

3. Under the present reorganization, do substantive and procedural due process still exist?

This issue will be answered *de facto* by the ruling. If the territorial conduct, *see* 28 U.S.C. § 3002(15), is authorized to sink so low, even below insolvency, such that agreements for loss of liberty may be proposed and agreed to in this state "on the fly," decency suggests delivering that terminal diagnosis "up front."

If there is no "on the fly" basis for incarceration, then there's a blatant violation of substantive due process, for there is no statute, thus no notice, no "fair warning." "The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. [*Bouie*, 378 U.S. at 351 (quoting *Harriss*, 347 U.S. at 617.)]" *Lanier*, 520 U.S. at 265 and n.5.

4. Is a Klein conspiracy, by this or any other of its wordings, statutory?

See Arnold's Brief, Point 4 (Fleming's Brief Point 4), and Arnold's motions for release pending appeal. *See also* the joint petition for mandamus.

The only way to arrive at any of the various Klein conspiracy versions is to reproduce what happened in 1954, i.e., combine § 371 (defraud) with § 7201 (both valuation and *payment*) and § 7212 (omnibus) (added, 16 Aug 1954; superceding indictment, 17 Sep 1954) to concoct the "charge." The Klein conspiracy looks to no statute in the entire Code of Laws of the United States. Here's the version used in Count One (2 App. Indictment 2 (¶ A)), identified by its hodgepodge components:

> to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) [§ 371 (defrauding)] ... for the purpose of impeding [§ 7212], impairing [*Haas*], defeating [§ 7201; *Haas*], and otherwise obstructing [§ 7212; *Haas*] the lawful functions of the IRS [§ 7212; *Haas*] in the ascertainment [§ 7201 (valuation)], computation [§ 7201 (valuation)], assessment [§ 7201 (*payment*)], and collection [§ 7201 (*payment*)] of federal taxes ... through deceit, craft, trickery and dishonest means [larceny, common law; *Haas*; *Caldwell*].
>
> THE LARCENY BY TRICK COMPONENT.
>
> to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) [§ 371 (defrauding)] ... through deceit, craft, trickery and dishonest means [larceny, common law; *Haas*; *Caldwell*].
>
> THE ADDED MENS REA COMPONENT.
>
> for the purpose of impeding [§ 7212], impairing [*Haas*], defeating [§ 7201; *Haas*], and otherwise

obstructing [§ 7212; *Haas*] the lawful functions of the IRS [§ 7212; *Haas*] in the ascertainment [§ 7201 (valuation)], computation [§ 7201 (valuation)], assessment [§ 7201 (*payment*)], and collection [§ 7201 (*payment*)] of federal taxes. *See also Hammerschmidt.*

Because any version of a Klein conspiracy is a kitchen-sink concoction, the condition precedent for application of the vagueness doctrine, i.e., that it is at least a legislative product, is impossible to satisfy. *See Morales*, 527 U.S. at 55-56.

If substantive due process still exists, then a crime is defined only under the color of the legislative process. *Lanier*, 520 U.S. at 265-66 and nn.5, 6; *Bass*, 404 U.S. at 347-48 (rule of lenity– (1) common language (2) legislatively enacted); *Cruikshank*, 92 U.S. at 556-59 (overbroad indictment; prosecutor to follow, not create, the law; questions of law are for the court, not the prosecutor).

In application, where the Indictment doesn't charge a crime at all, the defect is jurisdictional. *Peter*, 310 F.3d at 712-13. Also, "a district court is without jurisdiction to accept a guilty plea to a 'non-offense.' " *Id.* at 713 (citing *Meacham*, 626 F.2d at 509-10). *See also Menna*, 423 U.S. at 62-63 and n.2 (non-offense due to application of Double Jeopardy; objection not waived by plea). Thus, a guilty plea does not waive the objection that the indictment fails to charge an offense. *Pease*, 240 F.3d at 942-43.

5. Where the executive authority purports to create the "criminal" "statute," is there a violation of separation of powers?

As phrased, this subject matter jurisdiction question was not raised below.

Even during a state of emergency, and even exercising those war powers, the executive is limited by statute. *Youngstown Sheet & Tube.* If the executive may not seize *property* without a statute, how much more may the executive seize *a man* without a statute? Executives have

no authority to define crimes. *Industrial Union*, 448 U.S. at 672-77 (Rehnquist, J., concurring; citing *Field*); *Dennis* (1951), 341 U.S. at 525-26 ("those whose duty it is to legislative," p. 525) (Frankfurter, J., concurring). "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Field*, 143 U.S. at 692; *Schick*, 419 U.S. at 273-76 (Marshall, J., dissenting) (no authority to expand sentence by prohibiting parole).

Further, unless *Erie* applies only to civil matters, there being no such thing as "federal common law," neither is there such thing as a "federal common law" crime. *Cf. Holliday*, 70 U.S. at 415; *Bailey*, 444 U.S. at 406; *Turner Dennis*, 271 U.S. at 263 (demurrage distinguished from "penal law"); *OPP Cotton Mills*, 312 U.S. at 145 (essential legislative function includes formulation of policy and rule of conduct, distinguished from fact-finding as delegated to executive agencies). Where "fixing the rate of taxation is a legislative function," *Michigan Cent. R.R.*, 201 U.S. at 293-98, is not criminalizing the non-payment of that tax also legislative?

> We enter perilous territory because, as stated in [*Gradwell*, 243 U.S. at 485] there is no common law offense against the United States; "the legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." [*Hudson*, 11 U.S. (7 Cranch) at 34.] If a person is to be convicted of a crime, the offense must be clearly and plainly embraced within the statute. As stated by Chief Justice Marshall in [*Wiltberger*, 18 U.S. (5 Wheat.) at 105], "probability is not a guide which a court, in construing a penal statute, can safely take." It is one thing to allow wide and generous scope to the express and implied powers of Congress; it is distinctly

> another to read into the vague and general language of an act of Congress specifications of crimes. We should ever be mindful that "before a man can be punished, his case must be plainly and unmistakably within the statute." [*Lacher*, 134 U.S. at 628.] That admonition is reëmphasized here by the fact that § 19 imposes not only a fine of $5,000 and ten years in prison but also makes him who is convicted "ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States." It is not enough for us to find in the vague penumbra of a statute some offense about which Congress could have legislated and then to particularize it as a crime because it is highly offensive. Cf. [*James*.] Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference.

Classic, 313 U.S. at 331-32 (Douglas, J., dissenting). In the Klein conspiracy, what's added is statute to statute. "In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions." *Evans*, 333 U.S. at 486 and n.4. The absence of even a mention of executive function speaks volumes, for it doesn't even come to mind to *need* to mention the obvious, i.e., that the executive doesn't define crimes.

For the executive to concoct a tax crime violates separation of powers.

6. Does a non-statutory charge carry any "lesser included's" with it?

See Fleming's Brief, p. 54 (to this effect: if not, there is no charge to analyze).

"Since the provision as to the number of employees was not authorized, the entire definition of which that limitation was a part must fall." *Addison*, 322 U.S. at 618 (civil matter illustrating the principle that if a provision fails, it fails for all purposes).

In every single reported "lesser included" case, the trial court at least starts with a legislative act, and then analyzes for similar elements. *See, e.g., Carter*; *Whalen*, 445 U.S. at 691-93; *Blockburger*, 284 U.S. at 304. But, where the starting place is a kitchen-sink concoction of statutory pieces, picking an actus reus from one provision and the mens rea from an assortment of other provisions, for a court to give it any recognition, acknowledgment, receipt or acceptance, as "evidence of law," is for that court to exceed its statutory authority, which is limited to crimes defined by legislative acts. Points 4, 5, *supra*. No Statute? No "lesser included's."

7. Does Plaintiff-Appellee-Respondent have standing to complain of matters defined, in whole or in part, by 18 U.S.C. § 371?

As phrased, this subject matter jurisdiction question was not raised below. *But see* Fleming's Brief, Point 10; Arnold's Brief, p. 39.

Section 371 clearly addresses property of the "United States." So, from where in the world does the "UNITED STATES OF AMERICA" derive standing? Admittedly, 5 U.S.C. § 101 doesn't exactly say *whose* executive departments. But, Plaintiff is most certainly not a known or disclosed beneficiary! 31 U.S.C. § 321(d). So, where is Plaintiff's injury or damages? *Lujan*, 504 U.S. at 559-62; *Phillips Petroleum*, 472 U.S. at 803-04. Is it a proprietor, per 28 U.S.C. § 3002(15), and if so, does is act commercially, or is it pretending to represent the sovereignty of the "commonwealth?" Still farther, which of the prosecutors, as representatives of the "United States," had signature or other representative (power of attorney) authority on behalf of the plaintiff?

If the UNITED STATES OF AMERICA is an association, and if (a) the United States is a member, and if (b) the matters raised are germane to the purpose, there's still the question of how the known beneficiary subrogates its *criminal* complaint, such that (c) the real party in interest need not participate directly.

Automobile Workers, 477 U.S. at 281-82; *Hunt*, 432 U.S. at 343.

8. Can joinder ever occur with a party that lacks standing?

As phrased, this subject matter jurisdiction question was not raised below. *But see* Fleming's Brief, Point 10; Arnold's Brief, p. 39.

Where there is no standing, there is no case or controversy. *Hunt*; *Lujan*; *Allen*, 468 U.S. at 750-52; *FEC v. Akins*, 524 U.S. at 19-26 (injury in fact; specific statutory provision). No case or controversy means no subject matter jurisdiction, which renders joinder moot.

9. When is joinder "final?"

As phrased, this question and its subparts were not raised below.

See (2 App. Affidavit; 4 App. Affidavits).

Obviously, joinder never starts where there is no subject matter jurisdiction. Points 1-8, *supra*.

A. Where there's a plea, and where threshold and apparent joinder of issue follows from mistake of fact, may that mistake be corrected at allocution?

See Fleming's Brief, Point 15; Arnold's Brief, Point 12. Where mistake of fact negates mens rea for criminal conduct, Arnold's Ex. 2, pp. 53-57, 1 WHARTON § 78, CLARK & MARSHALL § 5.11, as well as meeting of the minds for agreements, 1 WILLISTON § 1:20, at 49-50, and where mistake of fact is a perfectly sound basis for not imposing sentence, it follows that joinder of issue, e.g., capacity, time, place, plane, discharge versus extinguishment, admiralty, etc., is still open for correction as of allocution.

B. If the signing of the "plea agreement" is the (last) time to "object or waive" regarding

joinder, does joinder exist where the "agreement" is (facially) self-breaching?

See Fleming's Brief, Point 7; Question 12, *infra*. The "agreement" contains (1) dismissal of all but Klein conspiracy, and, simultaneously, (2) (A) no facts in support of that "charge," and (B) nothing but purported support for all those dismissed counts. (2 App. "Plea Agmnt").

Based on 9.A., *supra*, it follows that the joinder issues are reopened.

C. Where there's a trial, and where threshold and apparent joinder of issue follows from mistake of fact, may that mistake be corrected as late as allocution, or is joinder irrebuttably resolved at the start of trial?

Based on 9.A., *supra*, where mistake of fact negates the mens rea of the offense, it follows that joinder, as based upon mistake of fact, is also available for correction. Since the final judgment is the "end" of the matter, until that moment, the elements upon which that judgment relies are logically still open for correction.

D. Is disclaimer, arising from asserting the preference for extinguishment as distinct from discharge, a matter of venue or personal jurisdiction, i.e, subject to threshold waiver or estoppel, thus a waste of time to raise thereafter, or of subject matter jurisdiction?

The focus here is the matter in the court. Where the party disclaims the "benefit" of dischargement, and asserts extinguishment, even as late as allocution, may he be bound to dischargement? The so-called "14th Amendment" suggests Yes (i.e., waste of time); *Perry* suggests No (i.e., subject matter jurisdiction).

10. Does an indictment that charges criminally the non-payment of FICA or FUTA seek to reinstate "debtor's prison?"

See Arnold's Brief, Point 3; Fleming's Brief, Points 3, 9, 12 and 19.

Jannuzzio strongly suggests that the answer is Yes.

The subject matter jurisdiction issues in Question 11 were not raised below.

11. Under *Erie* and the proprietorship doctrine, as they pertain to the special maritime and territorial jurisdiction,

A. does federal public trust policy preempt state public trust policy, for purposes of any of 28 U.S.C. § 3002(15)(a), (b) or (c), outside an area that qualifies under 40 U.S.C. §§ 255, 3111 or 3112?

The Indictment alleges "in the Middle District of Florida" (2 App. Indictment 1), among other places. But, if the governor has not signed over the property, then it must still be subject to the judicial (and legislative) authority of the State. Thus, even if the place established by joinder is purportedly in this state, *Erie* suggests that the choice of law in this state are the rules of decision are that of the State in which the federal court sits. To apply *Erie* is to presume diversity, 28 U.S.C. § 1332. Sections 1331 and 1333 may also appear to supply statutory subject matter jurisdiction, as suggested by 18 U.S C. § 7. However, as what type evidence, i.e., evidence of law or evidence of fact, is language relevant to a proprietor's commercial act? Since the law follows the money, and since the money is identified in 31 U.S.C. §§ 5101, 5103, but applies territorially via the UCC, even for purposes of the place alleged and joined, doesn't 18 U.S.C. § 8 apply through the UCC, rather than the other way around? Thus, where a corporation acts in its proprietary capacity within the State's UCC, it follows that the terms of the

obligation from Title 26 are evidence of fact, which raises the question as to how that same language schizophrenically also pretends to be evidence of law. Perhaps CNN and Delta should simply draft *their* own penal codes. While Title 18 arguably could supply evidence of law, there's still the problem with the parties in § 371.

And, while § 1333 may apply generally, which is fine regarding the forum, § 1333(1) takes the matter right straight back to the States via choice of law.

In short, even given joinder on the forum and the place, without affirmative proof of a governor's release of the place described in the Indictment, the choice of law rules favor the state's public trust provisions, for all purposes.

B. if part A is answered in the negative, even where the forum is proper, and even where the benefits exist from both public trusts, and even where something substantial moves in commerce so as to satisfy 18 U.S.C. § 8, doesn't the choice of law analysis still favor the state public trust policy, *especially* for an indictment?

In addition to 11.A., there's 18 U.S.C. § 13. Again, where the parties are allegedly transacting commercially, even if territorially, how does the situs stray from the confines of the judicial district of the State? Not to suggest even remotely that there's an absence of a remedy. Quite the contrary. It's just that of the three parties relevant to the transaction, if one is alleged to satisfy IRC § 7701(a)(6) or (14), and the other 28 U.S.C. § 3002(15)(A), the one remaining to supply a criminal code is the State.

C. even if that state's public policy doesn't apply, doesn't a "taxpayer" have access to the State's original statutory law and common

law via 28 U.S.C. § 1333(1) (saving to suitors)?

Again, the basic question is this: who supplies the penal code? Unless it's the State, then the federal corporation acts as beneficiary, legislator, prosecutor and judge. With one hand, it's a proprietor, and with the other, the "sovereign," all in the same transaction(s). It provides not only the "choice of law" rules, but then the "rules of decision," as well. This may be a superior business model, but as a jurisprudence model, it stinks.[2] To pick up the hat of the proprietor is to put down the hat of the legislator.

In sum, for Question 11, no § 371 (or Title 26) offense applies, even for a "citizen of the United States."

12. Under Federal Rule of Criminal Procedure 11 ("Rule 11"), is a plea properly set aside where the "plea agreement" is (facially) self-breaching?

See Fleming's Brief, Points 6, 7 and 19.

First, there's the problem with the charge, *see McCarthy*, 394 U.S. at 464-67 (unique procedural issue, generally), for where the *court* can't "understand" (recognize, take jurisdiction over) a non-offense, how can a *defendant* "understand" it, either? Secondly, there's the problem with the self-breaching "agreement."

One actual term, *see Benchimol*, 471 U.S. at 455, was that all Counts but the Klein conspiracy were to be dismissed. (2 App. "Plea Agmnt."). If the Klein conspiracy is a crime, at all, then it's a "larceny by trick" actus reus, with an added mens rea of the intent to commit (both forms of) tax evasion and to obstruct the administration of the tax system (just not "corruptly"). *See* Questions 1-4, *supra*. Still, a "larceny by trick with

[2] As proprietor, in conjunction with the financial institutions, in particular, it clandestinely suckers the person into the obligation, and then as "sovereign" it clobbers the person into next week somewhere, taking abusive and unmitigated advantage of the obvious absence of knowledge of the nature of the obligation. No legitimate public trust system even designs a Judas goat process.

the intent to commit embezzlement and non-corrupt obstruction" type of ridiculous concoction would have as active facts something that would establish a "wrongful *acquisition*" of property of the United States (or of an agency thereof). *None* of the facts establishes *any* such "wrongful *acquisition*;" *all* the numerics, etc., purport to establish *nothing but* liability for the DISMISSED Counts; and the judgment imposed sentence based upon that alleged "agreement."

It's inconceivable how an "agreement" could be more blatantly self-breaching than to say, in fact, "All of those are dismissed," *and* "You're being sentenced on all of those, and nothing but all of those, anyway." It follows reasonably that a plea induced by such "agreement" may be fully withdrawn per FED. R. CRIM. P. 11.

13. Under Rule 32(e), is a plea properly set aside where the "plea agreement"

A. charges usurious interest?

See Fleming's Brief, Point 8 (and 12). The "returns," (2 App. "Returns"), not only attempt to induce Fleming into reporting activity of a completely different fiduciary entity, namely the business, as his own, but also at a MARRIED FILING SEPARATELY rate, despite the fact that the prosecutors intentionally dragged Joyce Fleming, his wife, an innocent spouse, *see* Arnold's Brief, pp. 60-61, into the matter as a strategy to dog Fleming. It backfired. Dragging her through this, *and* commingling the business activity into the personal, *and then* charging Fleming, on the commingled numerics, at the MARRIED FILING SEPARATELY rate, constituted usury. The effective rate for 1996 is so high (greater than 25%) that forfeiture of principal follows. The total usury damages exceed $65,000.

B. seeks to reinstate "debtor's prison?"

See Question 10, *supra*.

C. charges *defrauding* but establishes not one penny's worth of property "wrongfully *acquired*?"

See (2 App. Indictment; 2 App. Judgment, 4 App. Judgment; 4 App. Dollar Study). Not one penny's worth of restitution is ordered. Not one penny's worth of "wrongfully *acquired*" property is alleged or proved.

D. seeks to impose sentence upon (*multiple*) allegedly *dismissed* counts?

See Question 12, *supra*, 18, *infra*. *See also* Fleming's Brief, Point 19.

E. if there is a lesser included offense in Count One, at all,

1. confirms, by its own terms, the wholesale and perpetual onslaught of fiduciary abuse?

See Fleming's Brief, Point 12. Per the "clean hands doctrine," no beneficiary can benefit from its (intentional) wrongful conduct. *See R. H. Stearns*, 291 U.S. at 61-62; *Precision Instrument*, 324 U.S. at 814-15. Between usury, "debtor's prison," deliberate and false bolstering of the numerics, wholly unfounded *defrauding* charge, sentencing on DISMISSED charges, among other problems, the plaintiff has pursued nothing but wholesale fiduciary abuse (under color of law, etc.).

2. asserts a claim sounding in trust, but fails even to allege, much less prove, any beneficiary?

Where is Plaintiff listed in 31 U.S.C. § 321(d)? Where is this plaintiff found *anywhere* in the Code of Laws of the United States? And, where the Department of the Treasury may be an "agency thereof" with respect to the "United States," it's obviously not the party with capacity to sue or be sued, making it not the real party in interest.

See Arnold's Brief, pp. 38-39. And, while the prosecutors purport to represent the named beneficiary, *that* party is *not* the plaintiff. So, where's the plaintiff's interest in the matter? It's certainly not of Record.

3. attributes to an individual "gross income" that is not any individual's, but rather is that of an unindicted entity?

See Fleming's Brief, Point 13. *If* all the entities are shams, nominees or sole proprietorships, then why in the world are separate fiduciary reports even *expected* for corporate, trust or partnership[3] income? *See* (2 App. Indictment 11 (¶ C.14)). Since Plaintiff *expects* such forms submitted, Plaintiff attributes "gross income" to *each* entity, thus *confessing* the *recognition* of each entity as a *separate* fiduciary. Yet, all "gross income" is simultaneously *FLEMING's?!* The unknown beneficiary is horribly confused.

4. holds as liable an alleged "responsible party" where no threshold liability in any entity is even alleged, much less proved?

See Fleming's Brief, Point 14. Liability for "income" from a trust comes in one of two ways: as the fiduciary, thus, as a "responsible party," or as the beneficiary. *Cf.* IRC § 641(b) *with* §§ 652(a), 662(a), 667(a). Where the trust is independent and has its own obligations, and where the trust doesn't fulfill those obligations, then a "responsible party" may be charged with the "100% penalty," which simply transfers the entity's obligation to the "responsible party." IRC § 6672. Thus, it's *not* the entity's *"income"* that is attributed the "responsible party," but rather the entity's *"tax liability."* In Arnold's trial, Plaintiff cannot have made a bigger deal out of characterizing Fleming as a "responsible party." But, there's not one penny's worth of "tax liability" for *any*

[3] Fleming was neither a general nor a limited partner in any entity involved.

entity, *any*where alleged, much less proved. *See* (2 App. Indictment; 4 App. Entity Chart).

To illustrate this another way, the "responsible party" is not a *conspirator*, but a *principal*. Such case is not defined around Fleming, but around the/an *entity*. Thus, that case certainly isn't defined by § 371 (defrauding), or even by *§ 371* (United States law), IRC § 7201 (valuation), § 641, § 6672 (Fleming), but rather by *§ 2*, § 7201 (valuation), § 641, § 6672 (Fleming), a charge found nowhere in the 19 Count Indictment.[4]

To complete the picture, by confusing the legal and accounting theories beyond all recognition, Plaintiff, rather than attribute the entity's "tax liability" to Fleming, attributed the entity's "income" to Fleming. While Arnold's trial Record may provide ample basis for concluding a "responsible party" attribution to Fleming, it is still the case that in addition to the fact that *this* charge was never even alleged, there's also not one iota of evidence that identifies Fleming as a beneficiary. And, while terminating trusts is certainly possible, BOGERT §§ 991-1010, rewriting them is not something accomplished unilaterally by one (unknown) beneficiary. Where statute even allows modification, *all* beneficiaries have to agree to it. BOGERT § 992 at 229. There is no evidence of any such unanimous consent. "One beneficiary cannot affect the interests of another beneficiary by his consent or ratification with regard to a change in the trust." *Id.* at 227.

A "responsible party" is liable for the entity's "tax," *not* it's "income." There exists not one allegation, matched completely by there being not one shred of evidence, of "tax liability" for any entity involved.

5. fails to establish any "tax deficiency" in any individual?

See Fleming's Brief, pp. 8-9, and Point 13. Since Fleming never consented to the numerics fabricated

[4] The exact same issue arises for Arnold. *See* Arnold's Brief, p. 49.

against him, (2 App. "Returns"), as demonstrated by his never signing those "for information only" "returns," and since none of that "income" is Fleming's, or any other individual's, there is still no evidence of any "tax deficiency" attributed to him, or to anyone else.

6. fails to establish any set of convictions to satisfy the term "corruptly?"

See Arnold's Brief, pp. 31-32; (2 App. Indictment, Judgment). The "judgment" reads "impeding or obstructing." This comes *not* from § 371 (defraud), but rather from § 7212 (omnibus) ("§ 7212") ("obstructs or impedes"). *See* Question 4, *supra*. But, not *all* of § 7212 is invited to play Klein conspiracy. Carefully written *out* of § 7212 is the key term that saves § 7212 from duplicity, namely "corruptly." *See* Question 5, *supra*. Practically speaking, do not *all* violations of the IRC, civil and criminal, "obstruct or impede?" If § 7212 is to be included, then it is to be included as a whole (e.g., via Fed. R. Evid. 106). "Corruptly" can't and doesn't look to mere allegations, but rather to convictions, for how can *any* lawful act *ever* qualify as "corrupt?" Since only "unlawful" acts qualify, and since "unlawful" is determined by conviction, not mere allegation, where there is but one (non-violent) "charge," it's legally impossible to satisfy "corruptly," because one (non-violent) charge, in and of itself, even if proved, *is not "corrupt."*

"Impeding or obstructing" necessarily exists also, and only, with "corruptly," yet "corruptly" was never alleged. Further, since "corruptly" is legally impossible to prove where there is only one (non-violent) charge, there can be no "impeding or obstructing" in this, or any, one (non-violent) count case.

7. asserts and confirms a position so inconsistent with the presumed role as to amount to disclaimer?

See Fleming's Brief, Point 14. "The remedies are by way of enforcement and not extinction of the trust." BOGERT § 861, at 28. To annihilate the business entity fiduciary, and to commingle all of its financial activities with some other obligation, is to disclaim recognition and acknowledgment of the fiduciary and to disclaim receipt and acceptance of the benefit. This manifestly inconsistent conduct by the horribly confused beneficiary triggered disclaimer instantly. *See* BOGERT §§ 170-72 (disclaimer and its effect) (in particular at 205-07). Since beneficiary status starts from the date of creation of the trust, disclaimer operates *nunc pro tunc* to that same date. BOGERT § 172, at 227-28.

F. arises from the same mistake of fact resulting from ignorance of the law that applies to the case, generally?

See Fleming's Brief, Point 15, generally, and p. 46, in particular. *See also* 1 WILLISTON § 1:20, at 49-50 (mistake is sound basis for rescinding or refusing to perform a contract). Never mind mistakes as to time and place. Fundamental here is the mistake regarding the legal impossibility of "wrongful *acquisition*" of property of the United States (or any agency thereof). Such conduct just flat never happened, and the complete absence in the Record of both allegation and proof of any such "wrongful *acquisition*" abundantly supports the conclusion.

14. Can the advisory panel's opinion be sustained where there is no evidence of

A. defrauding (wrongful *acquisition*)?

See Questions 1, 2, 12.C. and 13.F. *See also* Arnold's Brief, Points 5-6. Where there is no evidence of an element of the "charge," here, "wrongful *acquisition*," the panel's opinion cannot be sustained. *Morissette*; *Neder*, 527 U.S. at 15-20 (instruction); *Holland*, 348 U.S. at 125, 129 (evidence); *Christoffel*, 338 U.S. at 89-90 (evidence);

Moore, 429 U.S. at 22 (evidence); *In re Winship*, 397 U.S. at 364 (evidence).

B. "tax deficiency"

1. in any business entity?

2. in any individual?

See Question 13.E.5, *supra*, and Arnold's Brief, Point 4, in particular pp. 28-30. Applying 14.A., and viewing § 7201 as a "lesser included," where's the "tax deficiency?"[5] There is none proved for any entity, and the "income" is not any individual's. Therefore, if § 7201 *is* part of Count One, then a key element in the "charge" is completely absent. (2 App. Instructions).

15. Can the advisory panel's opinion be sustained where the definition of *defraud* in the charge is not the proper definition?

See Questions 1, 2 and 14, *supra*; Arnold's Brief, Points 5-7. Where the definition of *defraud* is errant, the elements of the offense are not presented, meaning that the prosecution gets a "bye" on the element(s), rather than scrutiny to the level of beyond a reasonable doubt. From one view, the errant law or definition invades the province of the jury, for the fact-finder cannot determine facts it doesn't know to determine. From another view, such error fails to satisfy the proper determination of the law, which is the province of the court.

16. Does the "judgment" that orders no restitution confess, judicially, the complete absence of any *defrauding*?

See (2 App. Judgment; 4 App. Judgment); Arnold's Brief, Points 8-9. Regarding terms and conditions for probation, per 18 U.S.C. § 3563(a), restitution is mandatory; per § 3563(b), discretionary. Per

[5] Petitioners prefer "(underpaid) '(net) tax imposed.' " It tracks § 7201; *all* § 7201 matters involve an underpayment; and this phrasing looks to *valuation* and *payment* to identify which level of proof is at issue. *See* Arnold's Brief, pp. 28-30.

§ 3663A(a)(1), restitution is mandatory at the time of conviction if the offense is described in § 3663A(c), which subsection includes, in (c)(1)(A)(ii), "an offense against property under this title, ... including any offense committed by fraud or deceit." Section § 3663A specifically applies both to plea agreements and convictions. Both "judgments" include probation time after incarceration. Neither "judgment" orders restitution. Therefore, the only logical conclusion is that there was no *defrauding*, as judicially confessed by the "judgments," themselves.

17. Where there is no § 7201 (*payment*) case (for there is no assessment), is there any authority for any payment mandamus?

Authority. *See* Arnold's Brief, pp. 28-30 and Point 10; Fleming's Brief, Point 18; (2 App. Judgment 4; 4 App. Judgment 4). Where the only "charge" is a Klein conspiracy, the only "payment" issue is restitution. Thus, the mere existence of a payment mandamus boldly announces sentencing based upon what is actually a non-existent count, or else a "lesser included" offense within Klein.

In *England*, the validity of the assessment mattered greatly, because the charge was § 7201 (*payment*). *England*, 347 F.2d at 429-31. Here, not one penny's worth of liability is affirmatively pled or proved, meaning that there is no assessment, meaning that this is not a § 7201 (*payment*) case. Yet, both "judgments" mandate payment.

For the trial, where there's an "assessment" introduced at sentencing, rather than at trial, Arnold has been totally and completely deprived of substantive due process. There's no notice of any § 7201 (*payment*) case, anywhere in the 19 Count Indictment. Morever, his right to cross-examine has been abrogated. Regarding the absence of evidence, there was no more a valid unit of account then than there is now, and it's impossible for there to be evidence in the Record to the contrary (unless

its perjured, and even *that* doesn't fix *this* problem).

For the "plea agreement," cross-examination isn't really the issue, but validity of the assessment still is, as is substantive due process.

There is no authority for any payment mandamus.

Vagueness. If there's authority for the payment mandamus, that still doesn't fix its vagueness problems. *Whose* "taxes" is Fleming ordered to pay: his, the entity's or those of the "third *res*?" *Which* "taxes:" "income," FICA/FUTA, or both/all? As for Arnold, given that the *entire* matter focuses on what *Fleming* did or didn't pay, how in the *world* is *Arnold* now liable to *pay Fleming's* "taxes," of *any* type or variety?! The mere *existence* of a set of numerics for Arnold makes him a principal, not a conspirator. And, where the Indictment proclaims to the world that DONALD C. and JOYCE FLEMING are the financial focus, for Arnold to have a payment mandamus is nothing but additional confession and confirmation that the *entire* matter focused *not* on *Fleming*, *not* on *Arnold*, but on the *entity!* And, that fact means that the parties, the legal theories, the facts, the accounting, *everything*, was errantly conceived and wrongly focused from the threshold. The real target was the unindicted entity, which Plaintiff annihilated, thereby disclaiming all.

In sum, the mandamus' vagueness, alone, renders it unenforceable. But, the mere existence of *this* payment mandamus against Arnold judicially confesses the entire case for the sick joke it is. Such mandamus, based upon *these* numerics, (A) (very doubtful) creates never before heard of "law" that a conspirator (1) may be ordered to pay another conspirator's "taxes," or (2) may be ordered to pay "taxes" that were *never* part of the case, or (B) (in reality) confesses that from the outset the "income" was the entity's, not any individual's.

18. Where there is a "plea agreement," can a "judgment" stand, where the Counts that form the basis for the "judgment" are the very same

as those agreed to be dismissed?

See Question 12, *supra*. *See also* Fleming's Brief, Point 19; (2 App. Judgment; "Plea Agmnt;" "Returns"). The Klein conspiracy count looks, if to any fact, to a "wrongful *acquisition*." There being none, there is no basis for any sentence based upon such "charge."

The numercis against Fleming include "income tax," FICA and FUTA amounts. But, the only counts for which such numercis could possibly be relevant are the DISMISSED counts. In sum, Fleming was sentenced not for any Klein conspiracy, but rather on all the counts allegedly DISMISSED.

Such "judgment" cannot stand.

19. Where there is a trial, can a "judgment" stand, where the Counts that form the basis for the "judgment" were dismissed and never tried?

See Question 18, *supra*. *See* Arnold's Brief, Point 11; (4 App. Numerics). Again, substantive due process problems scream from the page. The only "charge" tried was Count One, the Klein conspiracy, for which there is no statute, no "wrongful *acquisition*" pled and no "wrongful *acquisition*" proved. Yet, the numerics used against Arnold include (*Fleming's*) "income tax," FICA and FUTA, regarding which counts were DISMISSED even as against Fleming. Also, the numerics used against Arnold, in a case allegedly focused solely on Fleming, are numerics *never* attributed to Fleming! (Thus, Arnold is not a conspirator, but a principal.)

Such "judgment" cannot stand.

20. Can a "judgment" stand, where the indictment charges the party as a conspirator but he is sentenced as a principal?

See Arnold's Brief, Point 11; (4 App. Affidavits). The "crime(s)" for which Arnold is sentenced appear nowhere in the 19 Count Indictment. They were never tried. They simply "appeared" for purposes of sentencing. And, the

"facts" in support of those "charges" lodged for purposes of sentencing were never offered at trial, thus never subject to cross-examination. He was tried as a "conspirator," but sentenced as a principal.

On the one hand, as identified in Question 17, this treatment of Arnold confesses the obvious: the case was about the entity's "income," not any individual's. Thus, as with Fleming, even if Arnold *had* been charged properly, as a principal, as a "responsible party" for the entity, *see* Question 13.E.4, *supra*, there's still not even an allegation, much less proof, of any "tax liability" for any entity.

If the indictment is meaningless, and if trial is a facade, and if evidence at trial is unnecessary, and if cross-examination is irrelevant, and if all that matters is what the prosecution can get into the Record at sentencing, why is there anything but "sentencing hearings?" We obviously don't need grand juries, indictments, trials, evidence, cross-examination or trial juries. We only need pre-sentence reports and "sentencing hearings."

If the previous paragraph is not true, then this "judgment" can't stand.

21. Can either one of two related "judgments" stand, where, between them, they charge "double taxation?"

See (2 App. Numerics, Judgment; 4 App. Numerics, Judgment); Arnold's Affidavit (on appeal); Fleming's Brief, Points 20-21; Arnold's Brief, Points 13-14; Arnold's motions for release pending appeal; joint petition for mandamus.

For 1996, the prosecution levied at least two "taxes" on the "third *rex*." One was in Fleming's honor; another, in Arnold's. Plaintiff attributed 100% of the entity's "income" to Fleming, and then *another 75%* of that same entity's "income," for that same time period, to Arnold. Both Fleming and Arnold are subject to payment mandamus based upon those numerics. *Cf. Kurth Ranch*,

511 U.S. at.778-84 (punitive tax).

Not only is this fraud on the court, but also it's "double taxation" of the "third *res*," which was created by commingling the entity's (or really, various entities') activities into one pile of numerics for purposes of the litigation.

Plaintiff cleverly kept the information clandestine enough that neither Fleming nor Arnold knew of the "double dipping" until after both had been "sentenced;" hence Arnold's raising of the matter in the appellate Record.

Another subject matter jurisdiction issue, and a legality issue, not specifically articulated as such below, is that where Plaintiff, via this "double taxation" scam, actually sought a *de facto* forfeiture via an exorbitant "tax" rate, *and* for there also to be a loss of liberty sentence, there raises another type of double jeopardy. *See Kurth Ranch*; *Austin*.

22. Can either one of two related "judgments" stand, where, between them, they create "simultaneous double jeopardy?"

See (2 App. Numerics, Judgment; 4 App. Numerics, Judgment); Arnold's Affidavit (on appeal); Fleming's Brief, Points 22-23; Arnold's Brief, Points 15-16; Arnold's motions for release pending appeal; joint petition for mandamus.

Double jeopardy vitiates the second sentence, when a distinction between first and second is possible. Here, the double jeopardy issue occurs simultaneously, necessitating the vitiation of both judgments.

For 1996, by sentencing both Fleming and Arnold, on the same count in the same indictment, as agents for the same entity, over the same "business income," the actual owners of that entity are twice at risk of loss of property for the same offense, not only for Plaintiff's commingling, but also for the "double taxation," one "tax" in honor of each alleged agent. This sort of problem is avoided at the threshold by having a clue as to which party is the real

party in interest. Here's, it's a business entity, not any individual.

Conclusion.

Wrong legal theory (larceny is not embezzlement); wrong parties (both plaintiff and defendant); no statute (Klein is non-statutory); no facts (pled or proved regarding *any* "wrongful *acquisition*" or "tax deficiency" in any entity or individual); incompetent definition of *defraud*; mandamus for non-alleged *payment* case; sentenced on DISMISSED counts; charged as conspirators, sentenced as principals; "double taxation" (via fraud on the court); and simultaneous double jeopardy.

Remedies on Certiorari.

1. Petitioners request that this Court issue the writ of certiorari and take jurisdiction of this matter.

2. Petitioners request release pending appeal.

3. Petitioners request reversal of the "judgments" entered by the trial court.

Related Remedies.

4. Where the Court may identify additional issues that should be briefed for this matter, leave to file such supplemental brief is requested.

5. Per Rule 14.5, if there are any formatting matters that may be remedied via an amended filing, then leave for such amendment is requested.

6. If there are additional matters properly included in any Appendix, leave to amend or supplement the Appendix is requested.

7. Where there is an objection to service regarding this proceeding, time is requested to make proper service.

8. To expedite all matters, no oral argument is requested.

9. Tax costs to Respondent, thus reimburse Petitioners for costs and out of pocket expenses for this proceeding.

10. Petitioners request any and all other relief in equity to which Petitioners may show themselves justly entitled.

Respectfully submitted,

D nald C. Fleming, pro se
Jesup FPC
2600 South US Highway 301
Jesup, Georgia 31599

William Allen Arnold, pro se
2225 Haley Barbour Parkway
P.O. Box 5000
Yazoo City, Mississippi 39194

(2) Court, U.S.
FILED
03154 1 MAR 17 2004
OFFICE OF THE CLERK

Nos. _____ and _____

In The
Supreme Court of the United States

In re DONALD C. FLEMING and WILLIAM ALLEN ARNOLD,
Defendants-Appellants-Petitioners,
PRO SE, NO ATTORNEYS,
ASSERTING A RIGHT OF
SELF-REPRESENTATION

DONALD C. FLEMING and WILLIAM ALLEN ARNOLD,
Defendants-Appellants-Petitioners,
PRO SE, NO ATTORNEYS,
ASSERTING A RIGHT OF
SELF-REPRESENTATION
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee-Respondent

ON PETITION FOR WRIT OF MANDAMUS AND
ON RULE 11 PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX A (DONALD C. FLEMING)

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Order 15 December 2003 Opinion (and Order)

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
DEC 15 2003
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12283

District Court Docket No. 00-00262-CR-J-20-HTS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD C. FLEMING,

Defendant-Appellant.

Appeal from the United States District Court for the
Middle District of Florida

ORDER

Counsel in this direct criminal appeal has moved to withdraw and filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). An attorney who finds an appeal "wholly frivolous" and seeks to [p. 2] withdraw from further representation must nevertheless remain in "the role of an active advocate on behalf of his client." Anders, 386 U.S. at 744, 87 S.Ct. at 1400. Thus, counsel seeking to withdraw from further representation based upon the belief that an appeal is wholly frivolous must accompany the motion to withdraw with a brief that "set[s] out any irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another

counselor or the court, be arguably meritorious." United States v. Blackwell, 767 F.2d 1486, 1487-88 (11th Cir. 1985) (emphasis in original). Counsel must conduct a "conscientious examination" of the entire record on appeal. Penson v. Ohio, 488 U.S. 75, 80, 109 S.Ct. 346, 350, 102 L.Ed.2d 300 (1988). Counsel then must isolate the pages of the record relevant to those arguably meritorious points and cite relevant legal authority. United States v. Edwards, 822 F.2d 1012, 1013 (11th Cir. 1987). We, after plenary review of the record, must determine independently whether the case is wholly frivolous. Anders, 386 U.S. at 744, 87 S.Ct. at 1400

In his brief, counsel briefly relates some of the district court proceedings and discusses briefly the taking of Fleming's plea and why counsel believes there is no arguable issue related to the plea. Counsel mentions only in passing the fact that Fleming was proceeding pro se at the plea and does not discuss at all why [p. 3] there are no issues of arguable merit related to, among other things, Fleming's self-representation, the denial of Fleming's motion to suppress, and Fleming's sentence. This list of potential errors arises from a cursory review of the record and is not intended as exhaustive, but it does establish that counsel has not detailed all of the potential sources of error arising in the trial process that, "although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious." See Blackwell, 767 F.2d at 1487-88. Furthermore, our review indicates that the transcripts of six hearings are missing from the record on appeal and the transcription of a seventh hearing is incomplete. On this record, counsel, who does not appear to have been present at most of those hearings, cannot accurately state that he has conducted a conscientious examination of the entire record nor can we conduct the required plenary review.

Accordingly, we deny, without prejudice, counsel's motion to withdraw and direct him to supplement the record with complete transcriptions of:

(1) the August 15, 2000 hearing;
(2) the March 23, 2001 hearing;
(3) the March 27, 2001 hearing;
(4) the April 30, 2001 hearing; [p. 4]
(5) the May 24, 2002 hearing;
(6) the March 21, 2003 hearing; and
(7) the March 25, 2003 hearing.

Upon completion of the record, counsel may then submit a merits brief or renew his Anders motion with a conforming brief. Should counsel elect to renew his motion under Anders, he is hereby DIRECTED to address all irregularities and potential errors that might arguably support reversal, isolating the pages of the record relevant to the issue and citing appropriate, relevant legal authority.

DENIED, WITHOUT PREJUDICE.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

Rule 14(i)(ii)

Additional relevant opinions, orders (Clerk's actions), and etc.

28 April 2003 Final Judgment at trial

AO 245B (3/01 Rev. locally 9/01)
Sheet 1 - Judgment in a Criminal Case

FILED 2003 APR 28 P 4:19
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION
JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
v.
DONALD C. FLEMING

CASE NO. 3:00-cr-262-J-20HTS
Defendant's Attorney:
James A. Hernandez, Esq. (cja)

THE DEFENDANT:
X pleaded guilty to Count One of the Indictment.
__ pleaded nolo contendere to count(s) which was accepted by the court.
__ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
18 U.S.C. 371	Conspiracy to defraud the United States Department of Treasury for the purpose of impeding or obstructing the Internal Revenue Service.	November 1999	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

__ The defendant has been found not guilty on count(s)
X Counts Two through Ten and Fifteen of the Indictment are dismissed pursuant to the Plea Agreement.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 077-34-4383
Defendant's Date of Birth: February 6, 1943
Date of Imposition of Sentence: April 28, 2003
Defendant's USM No.: 21483-018
Defendant's Mailing Address: 1012 Crestdale St., Jacksonville, FL 32211
Defendant's Residence Address: 1012 Crestdale St., Jacksonville, FL 32211

CERTIFIED A TRUE COPY
SHERYL L LOESCH. CLERK /s/ Harvey Schlesinger
U. S. DISTRICT COURT HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

By: /s/
Deputy Clerk DATE: April 28 2003
( ) COPIES DISTRIBUTED
SCANNED 1222

3:00cr00262 #1222 Page 1/7

AO 245B (3/01 Rev. locally 9/01)
Sheet 2 - Imprisonment
Defendant: DONALD C. FLEMING Judgment-Page 2 of 6
Case No.: 3:00-cr-262-J-20HTS

IMPRISONMENT

The defendant is hereby committed to the custody of

the United States Bureau of Prisons to be imprisoned for a term of **27 months**.

_X_ The court makes the following recommendations to the Bureau of Prisons: an institution as close as possible to Jacksonville, Florida.

_X_ The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district.
_ at _ a.m./p.m. on _
_ as notified by the United States Marshal.

_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
_ before 2 p.m. on _
_ as notified by the United States Marshal.
_ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:
___[blank]_____

Defendant delivered on ___ to _____ at _____ ___, with a certified copy of this judgment.

_____
United States Marshal

By:_____
Deputy Marshal

3:00cr00262 #1222 Page 2/7

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
14) if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in

the Criminal Monetary Penalties sheet of this judgment.

AO 245B (3/01 Rev. locally 9/01)
Sheet 3a - Supervised Release
Defendant: DONALD C. FLEMING Judgment-Page 4 of 6
Case No.: 3:00-cr-262-J-20HTS

SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

_ The defendant shall participate in the Home Detention program for a period of _. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

_ The defendant shall participate as directed in an in-patient or out-patient program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which will include testing for the detection of substance use or abuse.

Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

_ The defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

_ If deported by the Immigration and Naturalization Service, the Defendant shall not re-enter the United States unless allowed to do so legally.

_ Defendant shall provide the Probation Officer access to any requested financial information.

_ Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or obligating for any major purchases without approval of the Probation Officer.

_ Defendant shall perform _ hours of community service as directed by the Probation Officer.

_ Defendant shall submit to a search of his/her person, residence, place of business, or vehicle conducted by the Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be

grounds for revocation; defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

X Defendant shall agree to undertake payment of all taxes, interest, and penalties found to be lawfully owed and due to the Internal Revenue Service with regard to both personal income taxes and all taxes due and owing from the operation of the various businesses the defendant controlled for, among others, the years 1993, 1994, 1995, and 1996, and to cooperate with and provide to the Internal Revenue Service any documentation necessary for a correct computation of all taxes due and owing for those years, including, if necessary, the filing of amended tax returns for said years.

AO 245B (3/01 Rev locally 9/01)
Sheet 5, Part A - Criminal Monetary Penalties
Defendant: DONALD C. FLEMING Judgment-Page 5 of 6
Case No.: 3:00-cr-262-J-20HTS

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The defendant shall pay interest on any fine or restitution of more than $2,500 unless the fine or restitution is paid in full before the fifteenth day after the date of Judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

	Assessment	Fine	Total Restitution
Totals:	**$100.00**		

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

_ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

_ The interest requirement is waived.

_ The interest requirement is modified as follows:

RESTITUTION

_ The determination of restitution is deferred until _. An Amended Judgment in a Criminal Case will be entered after such a determination. The U.S. Attorneys Office is directed to provide the necessary information to the court.

_ The defendant shall make restitution to the following victims in the amounts listed below:

_ Restitution is ordered jointly and severally with:

Name of Payee	**Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
Totals:	$		

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While in custody the defendant is directed to participate in the Bureau of Prisons' Financial Responsibility Program if eligible and upon release from custody the defendant shall adhere to a payment schedule as determined by the Probation Office.

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While in custody the defendant is directed to participate in the Bureau of Prisons' Financial

Responsibility Program if eligible and upon release from custody the defendant shall make nominal payments as determined by the Probation Office.

__ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While on supervision the defendant shall adhere to a payment schedule as determined by the Probation Office.

__ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While on supervision the defendant shall make nominal payments as determined by the Probation Office.

__ The defendant is ordered to immediately pay this obligation in full.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U. S.C. §3664(f)(3)(B), the court orders nominal payments and this is reflected on Sheet 6, Statement of Reasons.

AO 245B (3/01 Rev. locally 9/01)
Sheet 5 Part B - Criminal Monetary Penalties
Defendant: DONALD C. FLEMING Judgment-Page 6 of 6
Case No.: 3:00-cr-262-J-20HTS

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) non-federal restitution; (3) federal

restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties.

Payment of the total criminal monetary penalties shall be due as follows:

I. X In full
   A. X due immediately
   B. _ on or before ___.

II. _ In installments
   A. _ monthly in installments of $ over a period of _ months, to commence _ days after date of this judgment.
   B. _ in installments of $ over a period of _ to commence _ days after the date of this judgment.

Any payment ordered under Part II, must comply with 18 U.S.C. §3572, 18 U.S.C. §3664(n), and include a provision under 18 U.S.C. §3664(k) in which defendant must notify the court of any material changes in defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. §3664(f)(3)(A): [blank]

In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

_ The defendant shall forfeit the defendant's interest in the following property to the United States: [blank]

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary

penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the court.

3:00cr00262 #1222 Page 6/7

FILE COPY

Date Printed: 04/29/2003
Notice sent to:

✓ A. William Mackie, Esq. and Troy Sellers
U.S. Attorney's Office
Middle District of Florida
300 N. Hogan Street, Suite 700
P.O. Box 600
Jacksonville, FL 32201

✓ James A. Hernandez, Esq.
Hernandez & Hernandez
1905 Atlantic Blvd.
Jacksonville, FL 32207-3405

3:00cr00262 #1222 Page 7/7

1 May 2003 (Approximate date) Information regarding the Transcript Information Form

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
300 North Hogan Street
Suite 9-150
Jacksonville, Florida 32202
(904) 549-1900
www.flmd.uscourts.gov

Sheryl L. Loesch, Clerk
Eric A. Hogue, Jacksonville Division Manager

NOTICE TO COUNSEL OR PRO SE PARTY RE: PREPARATION OF 11th CIRCUIT TRANSCRIPT INFORMATION FORM

The Clerk's Office has recently received your Notice of Appeal. Enclosed is an 11th Circuit Transcript Information Form which will serve as a purchase order for transcript(s). A separate Transcript Information Form should be filed for each court reporter involved in this case.

Part I of the Transcript Information Form should be completed and the yellow copy filed with the District Court Clerk's Office, 311 W. Monroe St., Room 110, Jacksonville, FL 32202, within 10 days of the filing of the notice of appeal. This form should be completed for all cases, including those in which there was no hearing or for which no transcript is needed.

The pink and green copies are to be sent to the appropriate court reporters) if transcripts are being ordered. A photocopy of the form should be sent to the Clerk of the U. S. Court of Appeals for the 11th Circuit at 56 Forsyth Street, N.W., Atlanta, GA 30303 and to all parties.

SHERYL L. LOESCH, CLERK OF COURT

27 May 2003 Fleming's confirmation of intent to proceed without counsel. Dated the 16th, but not received until 27 May 2003.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

May 16, 2003
[handwritten note] Rcvd by [DCF] 5-27-03 [initials DF]
Donald C. Fleming (#21483-018
Duval County Jail
500 E ADAMS ST.
JACKSONVILLE FL 32202-2813

RE: 03-12283-D USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

Unless you elect to proceed without counsel or are financially able to obtain counsel, the court may appoint counsel to represent you in this appeal from your judgment of conviction. Please answer the following questions:

1. Do you elect to proceed without counsel?
   ANSWER: YES
2. Are you financially able to obtain counsel?
   ANSWER: N/A
3. Do you wish the court to appoint counsel to represent you in this appeal?
   ANSWER: N/A

IF THE ANSWER TO NUMBER 3 IS YES, PLEASE FILL IN AND RETURN THE ENCLOSED MOTION TO PROCEED IN FORMA PAUPERIS AND FINANCIAL AFFIDAVIT.
After answering 1 of the above questions, please sign in the space provided below and return this letter promptly.

SIGNATURE: /s/ Don Fleming

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nancy Holbrook/wl/404-335-6183

Counsel for appellant must file the enclosed Certificate of

Interested Persons with this Court within the provided response time.
Encl.

APPT-1 (1-1999)

6 June 2003 Clerk's action–Returning unfiled Fleming's Brief and Appendix. (*See* Arnold's Exhibit 2 (on appeal))

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

June 6, 2003

Don Fleming
1012 Crestdale Street
Jacksonville, Florida 32211

RE: Briefs and Appendix received 06/02/03

(X) The papers you recently submitted to this office are being returned for the reasons stated.:

You have court appointed counsel.

Sincerely,
THOMAS K. KAHN, CLERK
By Debbie Cordell
Supervisor-Brief/Case closing

wl/Pro-1
enc.

24 June 2003 Clerk's transmittal document accompanying Order

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

June 24, 2003

MEMORANDUM TO COUNSEL OR PARTIES

RE: 03-12283-D USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

COUNSEL MUST COMPLETE AND FILE THE ENCLOSED TRANSCRIPT ORDER FORM WITHIN 14 DAYS FROM THE DATE OF THIS LETTER.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nancy Holbrook /scw (404)335-6183
MOT-2 (3-2003)

24 June 2003 Order–Denying appointed counsel's first motion to withdraw

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
JUN 24 2003
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12283-D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD C. FLEMING,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

O R D E R:

The motion to withdraw as appointed counsel for Appellant, filed by attorney James A. Hernandez, is DENIED WITHOUT PREJUDICE TO RENEWAL subject to counsel['s] filing a motion to withdraw and brief in compliance with Anders v. California, 386 U.S. 738 (1967).

Appellant's request to proceed pro se is DENIED AS MOOT.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

27 June 2003 Clerk's action–Returning unfiled Fleming's Declaration and Motion, etc. regarding termination of *in forma pauperis*

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

June 27, 2003

Donald C. Fleming (#21483-018)
Baker Co. Detention Ctr.
56 N. 2nd St.
Macclenny FL 32063

RE: 03-12283-D USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

I am returning to you unfiled the pro se papers which you have submitted. Because you are represented by counsel, the rules of this court do not allow us to accept these papers from you. See 11th Cir. R. 25-1 and 11th Cir. R. 28-3. We suggest that you communicate with your attorney concerning issues or arguments which you believe should be presented to the court.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nancy Holbrook /scw (404)335-6183

Encl.

PRO-3 (8-2000)

26 June 2003 Subject document (the enclosure) of immediately preceding Clerk's action

FILED
U.S. COURT OF APPEALS
RECEIVED CLERK
26 JUN 2003
ATLANTA, GA.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283 D

Don Fleming,
Appellant
v.
UNITED STATES OF AMERICA,
Appellee

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

FLEMING'S DECLARATION
(and Alternate Declaration)
OF TERMINATION OF IN FORMA PAUPERIS
CAPACITY AND STATUS
(including, in the alternative, his)
MOTION TO BE DISPAUPERED
(plus his)
MOTION FOR EXTENSION OF TIME
TO FILE BRIEF

[p. 2] **Declaration**

In the event my Affidavit of 22 April 2003 did not specify clearly enough this intent and purpose, I reiterate and declare the termination of my *in forma pauperis* capacity and status. Recognition of this change intends to apply *nunc pro tunc* to the date of the Affidavit, namely 22 April 2003.

Alternate Declaration

As already confessed in my Affidavit, I had no idea that the "federal income tax system" was based upon a fiduciary obligation. Therefore, I had no idea of the mistake of fact I was making regarding the property interests involved in the matter. To continue with confessions of my learning in this process, and to acknowledge yet another mistake of law that has caused another mistake of fact, I have found the following

definition that applies to my present circumstance.

> FORMA PAUPERIS, English law. When a person is so poor that he cannot bear the charges of suing at law or in equity, upon making oath that he is not worth five pounds, and bringing a certificate from a counselor at law, that he believes him to have a just cause, he is permitted to sue in forma pauperis, in the manner of a pauper; that is, he is allowed to have original writs and subpoenas gratis, and counsel assigned him without fee. 3 Bl. Com. 400. See 3 John. Ch. R. 65; 1 Paige, R. 588; 3 Paige, R. 273; 5 Paige, R. 58; 2 Moll. R. 475; 1 Beat. R. 54.

BOUVIER'S LAW DICTIONARY (rev. 6th ed. 1856).

[p. 3] Given that this (alternate) standard is five pounds British Sterling, and that I had no idea before that this was the standard, I hereby declare that I am worth at least this five pounds British Sterling, that I have been worth at least five pounds British Sterling from 21 April 2003 to date, and, that I, thereby, no longer qualify as a pauper, under this standard, *nunc pro tunc* to 21 April 2003.

In the Alternative, his MOTION TO BE DISPAUPERED

Motion

Fleming moves that the court dispauper him, or else declare him not guilty.

Basis

> TO DISPAUPER, Eng. law. To deprive a person of the privilege of suing in forma pauperis. (q. v.)
>
> 2. When a person has been admitted to sue in forma pauperis, and, before the suit is ended, it appears that

> the party has become the owner of a sufficient estate real or personal, or has been guilty of some wrong, he may be dispaupered.

BOUVIER'S LAW DICTIONARY (rev. 6th ed. 1856).

Discussion

If my Affidavit didn't bring into effect the dispaupering, and if the above declaration doesn't clarify the Affidavit, then this motion is presented. Either the [p. 4] "system's" determination of a mere "appearance" "guilt" against me instantly and at that moment dispaupered me for the remainder of these proceedings, or else there's a matter of discretion in the hands of the administrative trustee being used for something other than my *benefit*. The only remaining alternative is that the "system" is heralding to the world that there is not even an appearance of guilt.

Recognizing that the options of analysis in this are limited to these three choices, we need to determine which is active.

Request for Relief

Fleming respectfully requests that the court either acknowledge the Affidavit, acknowledge the Declaration(s) presented here, or dispauper him by granting his Motion. Alternatively, declare the absence of his guilt.

MOTION FOR EXTENSION OF TIME

Due to the approaching shortness of time for filing the principal brief, originally submitted on or about 2 June 2003, but returned for lack of signature authority, as a direct result from this in forma pauperis issue, Fleming requests that the court issue the following rule regarding the filing deadline for his brief:

> Fleming's principal brief shall be considered timely filed if filed within 10 days following his receipt in

hand of the Order of this court allowing him to [p. 5] proceed by speaking on his own behalf.

The declarations and the motions are all

Respectfully submitted,

Don Fleming
1012 Crestdale Street
Jacksonville
Florida [32211]

Verification

In the event I have no access to a notary, I assert the following:

Noting that "this state" is estopped from asserting otherwise, via its confession at 28 U.S.C. § 1746, and genuinely not knowing whether I am, at the present time, executing this statement within "this state" (its territories, possessions or commonwealth) (a/k/a the United States) or outside of it, and while preferring to remain outside of it, but in whichever "location" this may be deemed executed, I hereby declare (or certify, verify or state), under the penalty of perjury, as may be defined by the law recognized by this forum, that the above and foregoing Declaration, Alternate Declaration, and all facts asserted for purposes of the both Motions are statements of facts that are true and correct, regarding which [p. 6] I have personal knowledge, and regarding which I am competent to make this Affidavit.

_____
Don Fleming
Affiant, Declarant

Date of signing: _____
[handwritten note] 6-26-03
[handwritten note] M-6-27-03

In the event I do have access to a notary, there's this.

Before me, the Undersigned Notary, personally appeared Don Fleming, who, upon satisfactory identification shown to me, and upon oath administered by me, deposed and stated as follows:

1. I am Don Fleming, a resident of the State of Florida, domiciled in the County of Duval.
2. I am at least 21 years of age. I have personal knowledge of these facts, which facts are true and correct, and I am competent to make this Affidavit.
3. The above and foregoing Declaration, Alternate Declaration, and all facts asserted for purposes of the both Motions are statements of facts that are true and correct.

Further, Affiant sayeth not.

[p. 7]

_____
Don Fleming
Affiant, Declarant

Date of signing: _____

_____
Signature of Notary Public (SEAL)

(Only if not visible in SEAL:)
Printed Name: _____
My Commission Expires: _____

Certificate of Service

By my signature below, I certify that I have served, or caused to be served, either by first class mail or hand delivery, a copy of this Document on the following:

Susan Raab [handwritten note] Mailed 6/25
Assistant United States Attorney
300 North Hogan Street, Suite 700
Jacksonville, Florida 32201

James Hernandez [handwritten note] Faxed 6/24
Hernandez & Hernandez
1905 Atlantic Boulevard
Jacksonville, Florida 32207

Don Fleming

8 July 2003 Clerk's transmittal document accompanying Order

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

July 08, 2003

MEMORANDUM TO COUNSEL OR PARTIES

RE: 03-12283-D USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

ENCLOSED TO APPELLANT IS THE 6/27/03 PRO-3 LETTER THAT WAS RETURNED (APPELLANT'S ADDRESS HAS CHANGED).

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nancy Holbrook /wl/404-335-6183

MOT-2 (3-2003)

8 July 2003 Order–Denying Flemings Declaration and Motion, etc. regarding termination of *in forma pauperis*

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
JUL - 8 2003
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12283-D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD C. FLEMING,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

O R D E R:

The "Declaration (and Alternate Declaration of Termination) of In Forma Pauperis Status...," filed by Appellant himself and construed as a motion to revoke his in forma pauperis status, to discharge his appointed counsel, to proceed pro se, and for other relief, is before the Court. The motion is DENIED in its entirety Appellant's counsel is reminded that he remains counsel Appellant.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

22 August 2003 (Supplement) Record of Clerk's action–Returning unfiled Fleming's Notice of Waiver of Right to Counsel, etc.

The document that follows, while filestamped, is not of Record in the Eleventh Circuit. It was returned as unfiled as of 22 August 2003.

18 August 2003 Subject document of immediately preceding Clerk's action

U.S. COURT OF APPEALS
RECEIVED CLERK
AUG 18 2003
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283 D

UNITED STATES OF AMERICA,
Plaintiff–Appellee,
v.
Don Fleming,
Defendant–Appellant

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

FLEMING'S NOTICE OF WAIVER OF RIGHT TO COUNSEL ON APPEAL and accompanying alternative MOTION TO ALLOW WAIVER OF RIGHT TO COUNSEL ON APPEAL

Alternatively, his
MOTION TO APPOINT (NEW) APPELLATE COUNSEL

[p. 2] **Unabridged History of this Matter**

Fleming initially raised the right to counsel in the context of speaking on his own behalf. (Docket Entry 108. *See also* 170, 189.). There being no waiver, the court appointed counsel for Fleming on the issue of self-representation. (146, 147). Subsequently, the court appointed counsel. (279. *See also* entry of 13 September 2000, letter regarding substitution of counsel.). Because Fleming had exercised self-representation, the beneficiary moved to strike Fleming's pleadings as not submitted by counsel. (296). The court ruled on Fleming's motions. (*See* 233, 293 & 295). Thus, it was clear that prior to the formal appointment of counsel, Fleming exercised his right to represent himself.

Fleming's counsel's next motion (extension of time) is Docket Entry 350, which was granted. (358). Via counsel, Fleming subsequently filed various motions. (*See, e.g.,* 403-409). Fleming then moved that appointed counsel withdraw, (615), and by way of emergency, gave notice of termination of the lawyer-client relationship so as to proceed on his own behalf. (638, 639). At the hearing, the court granted the relief, stating that Fleming freely, knowingly and intelligently waived his right to counsel. (661). The court granted the motion to withdraw. (662). In a separate and specific order, the court indicated this:

> [T]he defendant freely, voluntarily, knowingly and intelligently waived his right to counsel and the Court determines that he is competent to waive his [p. 3] 6th Amendment right to counsel; accordingly, the defendant shall proceed pro se in this matter and his right to counsel in this matter will be forever waived.

(Docket Entry 663). Fleming has filed no financial statement of any type or kind.

Fleming filed several documents later struck from the Record. (714-730 and 780; 810 and 847; 889 and 921; 945 and 949; 1006 and 1008). However, Fleming also filed motions that were ruled on (denied, but ruled on). (856-857 and 867; 898 and 910 (denying a motion to strike); 883, 888, 889 and 922; 920 and 930; 938 and 942; 954-955 and 957; 971 and 972; 978 and 993; 990 and 997; 1002 and 1011; 1004, 1007 and 1008). Representing himself, Fleming eventually entered a plea of guilty with a "plea agreement." (1059, 1060). The court set sentencing for 27 March 2003. (1061).

On 19 March, as sentencing approached, Fleming sought counsel, via emergency. (1164). On 21 March, the court appointed the same counsel as before. (1171, 1180, 1198). Counsel requested a continuance, which was granted. (1172 and 1178). Sentencing was reset for 28 April. The court added the additional condition that Fleming may be required to reimburse this cost. (1180).

Two weeks before sentencing, Fleming came into a new understanding of his entire case. Six days prior, 22 April, Fleming filed his Affidavit, exercising his right of allocution, asserting his defenses, objections and positions never before [p. 4] raised for him or any other defendant. (1218). On the following day, he terminated the lawyer-client relationship, due to the conflict of interest that arose. (1219). Apparently, the Affidavit was filed again. (1220). The trial court made inquiry of the termination notice, but this time, no change in the relationship occurred. (Per sentencing, Docket Entry 1221). The trial court did not consider Fleming's Affidavit. (1221, referring to 1218; 1220 is presumed included). *See also* (2 App. Tab 8 pp. 18-32) and (*id.* at 18, lines 9-16 (plaintiff stipulated to it)).

In *this* court, Fleming's original effort to file his principal brief was rejected. Appointed trial counsel requested withdrawal from this appeal, which was denied. Where *Anders* (state-based, "14th amendment"

genre cases) is the standard, withdrawal *should* be denied. This appeal definitely has merit. *Accord, Ellis v. United States*, 356 U.S. 674, 78 S. Ct. 974, 2 L. Ed. 2d 1060 (1958).

Via Declaration and conditional Motion, construed as a Motion to Revoke In Forma Pauperis Status, and relying upon common law, Fleming sought to confirm or to initiate termination of his in forma pauperis ("IFP") capacity and status. By order of 8 July 2003, the dispaupering relief, and everything else requested, was denied.

Fleming understands the court's order of 8 July. He well receives the court's admonition as to the role of lawyer and client, and he intends no disrespect. [p. 5] It's just that certain things simply *cannot* be raised via counsel. Also, Fleming has no intention of waiving his objection(s) in this area, generally. In sum, the totality of the circumstances compels Fleming to file this directly. While this may be *as* frustrating for the court (and appointed counsel), this cannot possibly be *more* frustrating for anyone than for Fleming, who remains in jail.

Waiver of Right To Counsel on Appeal, and accompanying alternative Motion to Allow Waiver of Right to Counsel on Appeal

IFP status exists to allow access to the court(s) throughout each stage of the entire legal process. IFP depends upon financial conditions, and it consists of two fundamental aspects: *threshold* (filing fees), and *substantive* (representation).

Regarding threshold access, Fleming has already demonstrated his ability to cover the filing fees and costs of court for this appeal.

And, in order to *obtain* substantive, meaningful access, Fleming gives notice of his voluntary, knowing, and intelligent Waiver of Right to Counsel on Appeal, as confirmed by signature here:

/s/ Don Fleming 8-11-03
Don Fleming

While this seems the nature of a notice, if this is properly a motion, then such motion to allow waiver of right to counsel on appeal is asserted. Fleming [p. 6] understands that this court will look to the totality of the circumstances, including conflict of interest, age, experience, education, background, intelligence, and the presence or absence of intimidation, coercion or deception.

In the alternative, Fleming's Motion to Appoint (New) Appellate Counsel

With no intention of waiving his right to speak on his own behalf, and simply to propose a temporary, interim solution for all involved, Fleming notes that this court *could* appoint him different *appellate* counsel.

Fleming respectfully reserves the right to object to such appointment, as he asserts regarding the present appointment, as this case and its uniqueness on appeal may require him so to do. For example, the appointee shall (a) have won at least one IRC § 7201 matter at trial or on appeal; (b) know (1) the difference between "gross income" and "tax imposed," (2) between *business* "gross *income*" and *individual* "*tax* imposed," (3) what "claim of right" means, (4) the substantive difference between Married Filing JOINTLY and Married Filing SEPARATELY, (5)(A) the substantive difference between legal ownership theories and equitable ownership theories, and (B) the competent accounting that goes with each theory; and (6) the unconscionable difference between "joint and several liability" and the recently exposed *multiple and separate liability* offenses committed against at [p. 7] least Fleming and Arnold, which "numerics" quite clearly rise to the level of fraud on the trial court. Such appointee shall (c) be able to recognize an attempted willful misappropriation (theft) case when s/he sees one, so as to analyze correctly the

necessary actus reus and mens rea for such alleged crime; (d) understand the executory nature of "plea agreements;" and (e) understand the Law of Trusts, in particular disclaimer, which permeates this entire case.

To bring this full circle, should there be no authorized representative presently available who can fulfill these basic criteria and competencies, then Fleming *is* the best (*only*) one to present *his* appeal, *this* appeal.

Prologue

The objective here is to get on with the business of presenting *this* appeal in a fashion and manner consistent with notions of justice and fairness. Given that Fleming sits in jail based on *these* "numerics," and that the level of conflict that exists here is substantial, there *must* be a solution, for all involved.

Even unrepresented prisoners blatantly and solely out to screw over the correctional officers get "three strikes." Yet, a serious physical endangerment or injury issue overrules that bar. Here, the real injury is the loss of liberty. Even if Fleming spots two "strikes" to the score, since it's *Fleming's* liberty at issue, there is an increasingly *diminishing* reason not to allow him *his* appeal.

[p. 8] This case started out as a political hot potato. Nothing has changed, and Fleming *still* seeks to have *his* appeal heard. Therefore, he submits his voluntary, knowing, and intelligent Waiver of his Right to Counsel on Appeal. If necessary, as an interim measure of alternative relief for all concerned, for the time Fleming is to be recognized solely through counsel, at least appoint temporary, interim new counsel who can discuss at least these concepts: *business* "gross income" versus *individual* "tax imposed," "claim of right," usury, debtor's prison, trusts and disclaimer, conflict of interest, compelled acceptance of a fiduciary role, and mistake of fact induced by ignorance of law, as each applies in *this* (theft) case.

Discussion

History of IFP. In his book, THE FORGING OF THE FEDERAL INDIGENT CODE, Comer provides insight to the 200-year development of the access to the courts from the dates relevant to the founding of this people of the United States through the mid-1960's. JOHN P. COMER, THE FORGING OF THE FEDERAL INDIGENT CODE (1966). In his disciplined effort to present the information objectively, he actually understates the significance of the legal and social history he records. Access to the courts didn't really exist at first. Many key advances started in the 1870's. Advances in the [p. 9] criminal area took the lead, the earliest representation matters dealing with the most serious of cases, the death penalty cases. Advances in the civil area followed. In short, there's been a *huge* development in this area of access to the courts over several generations, from practically no access to what is now the "three strikes" rule by which frivolous complaints of inmates are tolerated, but which operates as a bar, shy of serious physical abuse complaints. *See* 28 U.S.C. § 1915. Abuse tends, and reasonably so, to change people's minds.

Two fundamental aspects. Two fundamental issues exist for IFP access: (1) *threshold* (filing fees and costs of court), and (2) *substantive* (representation).

Threshold Access. Fleming paid his fees for this appeal. Fleming paid for the transcript of the sentencing hearing. To borrow a practical reality from 28 U.S.C. § 1915, which doesn't apply here, fees must still be paid, whether up front or in installments, regardless of IFP. As for this specific appeal, the access to the courts through filing fees and basic costs of court is simply not the issue. Fleming paid these in advance.

In sum, it matters that threshold access exists. Where the individual finds himself in need of access, it's available, and private organizations of all sizes and interests are also available to contribute resources to those in need of threshold access to the courts. For

purposes of this appeal, and as demonstrated, Fleming is simply not one who has a threshold access issue.

[p. 10] Substantive Access. It may be a unique circumstance for one to seek to dispauper himself. However, when substantive, meaningful access has been effectively denied, it makes sense to find another route.

Rules matter. Procedures matter. Capacity issues matter. Consistency matters. Therefore, we discipline ourselves according to the rules, and let the chips fall where they may.

Fleming and Arnold, each *without* representation, *are* the ones in the best position to discuss *this* case. Each raised issues at the 11th hour not previously raised by any other defendant in the case, and Arnold has recently also filed another Affidavit (Case No. 03-12810-D) exposing the "double dipping" engaged in by the beneficiary. Thus, Fleming isn't focusing solely on appointed counsel. For example, in *United States v. Jannuzzio*, 184 F. Supp. 460, 465 (D. Del. 1960), the beneficiary sought criminal sanctions for non-payment of FICA. It's subtle, but the trial court's analysis *does* point out the deficient character of a case that seeks to reimplement debtor's prison. *Who* raised that issue, which screams out from the Indictment? Fleming and Arnold.

Which "right?" The conceptual basis for the right to *assistance* of counsel is the Sixth Amendment. However, *if* the Sixth Amendment *were* the basis of the idea in practice today, then we'd see the complete bar to, the complete lack of [p. 11] subject matter jurisdiction for judicial activity in which the right to assistance is not respected. The Sixth Amendment, as one of Ten Additional Prohibitions, *limits* the constitutional Government. It *grants* nothing; rather, by weaving the pre-existing right to assistance into the fabric, it operates to *prohibit* Article III judicial authority where this pre-existing right is not respected.

What the "sixth amendment" shifts the focus to is a right to *representation* which competes with the right to

"self-representation," or to "represent oneself," which label, on first pass, appears to be a misnomer. One "represents" someone *else*; one "speaks" for one*self*. However, if we are talking about two completely separate capacities being present at the exact same time, the one "representing" the other, *then* "self-representation," or "representing oneself," tells us something.

Since what exists are competing "rights," which is preferred? Are these viewed differently on appeal? What is the scope of a waiver of either one? By what standard, law or discretion, is either evaluated? A couple of annotations and a statute provide a place to start for these questions. Gary Knapp, Annotation, *Supreme Court's Views as to What Constitutes Valid Waiver of Accused's Federal Constitutional Right to Counsel*, 101 L. Ed. 2d 1017 (1990) ("Knapp, *Waiver*"); John F. Wagner, Jr., Annotation, *Supreme Court's Views as to Accused's Federal Constitutional Right to Counsel on Appeal*, 102 L. Ed. 2d 1049 (1990) ("Wagner, [p. 12] *Appeal*"); 18 U.S.C.S. § 3006A (Law. Co-op. 1993 & Supp. 2003) ("§ 3006A").

While waiver *may not* occur "accidentally," it *may* occur deliberately. Knapp identifies only a couple of specific examples for appeals. Knapp, *Waiver*, at 1042 (§ 15). But, as identified throughout, where there is an affirmative declaration regarding waiver, the waiver is recognized, as the trial court did in this case. What Wagner's study points out, generally, is that there are similar standards for representation on appeal. For example, the accused enjoys the right to effective assistance of counsel on appeal. Wagner, *Appeal*, at 1055-56 (§ 3(b)). As supported in each annotation, the right to representation prevails over the right to self-representation, until such time as the defendant voluntarily, knowingly and intelligently waives the right to counsel. Since the right to counsel applies at every stage of the criminal proceeding, the scope of waiver of the right to counsel is a "per stage" scope. Waiver for one stage or several stages does not necessarily also constitute waiver for the next one, as also shown in the

trial proceedings here. And, the statute provides both legal and discretionary standards for evaluation.

> "Shall be represented" *when*?
> (c) Duration and Substitution of Appointments. - A person for whom counsel is appointed *shall be represented* at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings.

[p. 13] 18 U.S.C.S. § 3006A(c).

For context, there's the classic "shall" and "may" difference incorporated into this statutory plan. From § 3006A(a)(1) ("(a) Choice of Plan. ... (1) *Representation shall be provided* for any financially eligible person who - ..."), there's the "shall" side, and then from (a)(2) the "may" side, which simply expands the list, in the interests of justice ("Whenever the United States magistrate judge or the court determines that the interests of justice so require, *representation may be provided* for any financially eligible person who - ...").

"Shall be provided" *when?* "May be provided" *when?* At all times and stages *prior to* there being entered of Record a voluntary, knowing and intelligent waiver of the right to representation, which waiver operates until there is another stage *and* an affirmative request for representation.

> Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him.

Id. at § 3006A(b). Thus, to address "shall be represented" *when*, the question is answered: until there is a voluntary, knowing and intelligent waiver. The trial

court followed and applied meticulously this standard from the outset.

The appeal is a new stage of the proceeding. In this Record, for this stage, for the entirety of the remainder of additional stages on this appeal, and for all [p. 14] subsequent stages for this case, whether additional trial, additional appeal or both, whether mandatory or discretionary, Fleming voluntarily, knowingly and intelligently waives his "federal constitution" "sixth amendment," and § 3006A, right to representation by counsel.

/s/ Don Fleming 8-11-03
Don Fleming

New counsel. As regards the alternative motion, to appoint (new) appellate counsel, Fleming did not write the "tax code." It is not within his control that certain practitioners make entire careers out of a few *sections* of that trust indenture. Thus, it's not his fault that specialization exists among the authorized representatives, much less even within the group of "federal tax" practitioners. In short, if *substantive* access has any reality for a specialized matter, then a defendant is *more than* fully entitled to receive that specialized *substantive* access. How can the public policy of meaningful access be satisfied any other way? It can't. To "do one's best" matters, but that focuses on a right to *representation*, not a right to *assistance*. Does one take a broken toe to an ophthalmologist? Many eye doctors are *perfectly* capable of setting the appendage, but this is *not* the typical procedure, which in no way raises a question to *any* eye doctor's ability in ophthalmology. It's just that whatever emergency (i.e., immediate and short term) [p. 15] care provided is normally followed promptly by examination and long term care by the orthopedic specialist. In general, is something better than nothing? In a lot of cases, it most *definitely* is. Zero question about that. But herein lies the rub; it *is* a case-dependent answer.

Additionally, it may be suitable to consider, at some point, establishing a sua sponte standard that allows for appointment of new counsel upon the existence of Record of a conflict of the nature that justifies inquiry. In other words, there comes a point when the matter, as is the case here, is so clear, and genuine, not at all even remotely asserted for delay, where, in lieu of a waiver, *not* providing relief in the form of new counsel tends to defeat completely the purpose of having the lawyer-client relationship in the first place.

Conclusion

IFP addresses *threshold* (filing fees) and *substantive* (representation) access. Fleming doesn't have the threshold issue, and he voluntarily, knowingly and intelligently waives his right to counsel for this stage and all future stages of this case. If this is a motion, then Fleming so moves, as confirmed by signature.

/s/ Don Fleming 8-11-03
Don Fleming

[p. 16] Alternatively, if there exists a problem with this waiver, then, because Fleming and Arnold intend to "commission" this court to write the bible for § 7201 cases, from indictment to sentencing, by relying upon the justiciable issue doctrine of *Roe v. Wade* should timing deem such necessary, should there be an interim, short term, need for appointment of new counsel for Fleming for this appeal, there are certain aspects of competence that the representative must have. Otherwise, it's impossible to say that Fleming is any less capable of representing himself for *his* appeal than any of the available authorized representatives.

Relief Requested

Fleming announces his Waiver of Right to Counsel on Appeal, expecting that the suitable sua sponte activity

consistent with such declaration will follow. Alternatively, Fleming requests that this court grant his Motion to Allow Waiver of Right to Counsel on Appeal. Alternatively, by way of an interim solution, Fleming requests that this court at least appoint (new) appellate counsel.

Respectfully submitted,

/s/ Don Fleming 8-11-03
Don Fleming
1012 Crestdale Street
Jacksonville
Florida [32211]

[p. 17] **Verification**

In the event I have no access to a notary, I hereby declare (or certify, verify or state), under the penalty of perjury, as may be defined by the law recognized by this forum, that I am competent to make this Verification, that I have personal knowledge of the facts, that they are true and correct, and that the above and foregoing Waiver of Right to Counsel on Appeal, as recognized as arising from the "federal constitution's" "sixth amendment," and from 18 U.S.C. § 3006A, and from any other applicable source, as it applies to this stage and all subsequent stages of this case, is made fully within my discretion, a voluntary exercise with a sound and disposing mind, in full knowledge of my right to representation by counsel at every stage of this proceeding, and with full reflection on and intelligence of the legal consequences and results of this waiver. I have signed three times in this document, plus the document submission signature, plus this Verification, voluntarily, knowingly and intelligently, in order to bring this waiver into effect in the Record of this matter.

Date of signing: 8-11-03 /s/ Don Fleming
Don Fleming
Affiant, Declarant

[p. 18] In the event I do have access to a notary, there's this.

Before me, the undersigned Notary Public, personally appeared Don Fleming, who, upon satisfactory identification shown to me, and upon oath or affirmation administered by me, deposed and stated as follows:

1. I am Don Fleming, a resident of the State of Florida, domiciled in the County of Duval.
2. I am at least 21 years of age. I have personal knowledge of these facts, which facts are true and correct, and I am competent to make this Affidavit.
3. The above and foregoing Waiver of Right to Counsel on Appeal, as stated in the document, confirmed by my signature three times in the document, and again by signing the document's submission signature block, and yet again here, by which I intend to incorporate the Verification paragraph above, I make voluntarily, knowingly and intelligently.

Further, Affiant sayeth not.

Date of signing: 8-11-03 /s/ Don Fleming
Don Fleming
Affiant, Declarant

not available - see page 17
Signature of Notary Public (SEAL)

(Signature block continued)
[p. 19] (Only if not visible in SEAL:)

Printed Name: _____
My Commission Expires: _____

Certificate of Service

By my signature below, I certify that I have served, or caused to be served, either by first class mail (certified, return receipt requested) or hand delivery, a copy of this Notice of Waiver of Right to Counsel on Appeal, and the accompanying alternative Motions, with Verification, on the following:

Susan H. Raab
Tamra Phipps
Assistant United States Attorneys
Appellate Division
300 North Hogan Street, Suite 700
Jacksonville, Florida 32202

James A. Hernandez
Hernandez & Hernandez
1905 Atlantic Boulevard
Jacksonville, Florida 32207

Paul I. Perez, Jr.
United States Attorney
Middle District of Florida
400 North Tampa Street, Suite 3200
Tampa, Florida 33602

Sheryl L. Loesch, Clerk of Court
United States District Court
Middle District of Florida
George C. Young U.S. Courthouse
and Federal Building
80 North Hughey Avenue
Orlando, Florida 32801

/s/ Don Fleming
Don Fleming

25 September 2003 Clerk's action–Returning unfiled Fleming's *Mickens* Affidavit

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

September 25, 2003

Donald C. Fleming (#21483-018)
Jesup FCI
2600 S US HIGHWAY 301
JESUP GA 31599-5676

RE: 03-12283-DD USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

I am returning to you unfiled the pro se papers which you have submitted. Because you are represented by counsel, the rules of this court do not allow us to accept these papers from you. See 11th Cir. R. 25-1 and 11th Cir. R. 28-3. We suggest that you communicate with your attorney concerning issues or arguments which you believe should be presented to the court.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nicole Jones (404) 335-6173

Encl.

PRO-3 (8-2000)

22 September 2003 — Subject document (enclosure) of immediately preceding Clerk's action

U.S. COURT OF APPEALS
RECEIVED CLERK
SEP 22 2003
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283-DD

UNITED STATES OF AMERICA,
Plaintiff–Appellee,
v.
DONALD C. FLEMING,
Defendant–Appellant

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

FLEMING'S AFFIDAVIT GIVING NOTICE OF RECORD, PER *MiCKENS*, OF INEFFECTIVE ASSISTANCE OF COUNSEL

The circumstances are unfortunate; alternatives, increasingly limited.

/s/ Don Fleming
Don Fleming, in my FEDERAL CAPACITY as DONALD C. FLEMING

[p. 2] Pursuant to 28 U.S.C. 1746, I, Don Fleming, in "this state," in my FEDERAL CAPACITY as DONALD C.

FLEMING, looking to *Mickens v. Taylor*, 535 U.S. 162 (2002), as that may apply for appellate proceedings, depose and declare (or certify, verify or state), under the penalty of perjury, as that may be defined by the law recognized by this forum, as follows:

1. I am at least 21 and competent to make this Affidavit. I have personal knowledge of the facts, and they are true and correct. The legal opinions are my own, and they are based upon due diligence study of the matters presented.

Facts, Not Self-Representation.

2. I am now aware of *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152 (2000), and in this Affidavit, I'm not asserting a right to self-representation on appeal. I'm simply asserting, in my role as one with personal knowledge of material and developing facts relevant to this matter, those facts relevant to my personal, protected and fundamental right of effective assistance. Thus, rather than making a direct request for relief, I'm simply making the Record for this factual, material issue, timely enough to allow a resolution that allows me (or a substitute representative) time to file a brief for my appeal. [p. 3]

No effective communications.

3. While I've been filing documents in this matter, I've also been waiting for a response from appointed counsel to my correspondence and phone calls. Since sentencing, appointed counsel has not seen fit to communicate, in writing or phone, about anything, in particular his thoughts on the appeal.

4. After I was first incarcerated, while he was counseling other clients, he did at least stop by briefly, just long enough to provide a form that was supposed to allow me to exercise self-representation on appeal. Based upon that filing and information, I submitted a brief on or about 2 June 2003, which is now Exhibit 2 (with Appendices, Exhibits 3, 4 and 5) in the Record in ARNOLD's appeal, Case No. 03-12810-D, which brief was

returned to me, because I was not recognized as one authorized to exercise self-representation on appeal. There was one other very brief visit early in May, but I've heard nothing from him until last week.

5. In the one conversation with him in early May, he indicated that he felt I had nothing to appeal, and that he was going to file a motion to withdraw, which he did file (but apparently didn't copy me on), and which, obviously, was denied.

6. I'm sure I've sent him every document I've filed. Still no word.

7. Recently on 9 September, last week, four and a half months of incarceration later, after numerous attempts to contact him by phone, and by two letters, I placed [p. 4] another pre-paid call to counsel. He actually took the call this time, and we talked briefly. He seemed not to be terribly interested. He told me he was awaiting transcripts of the two hearings he had requested. When I told him I already had the transcript of the sentencing hearing which I had ordered in early May (which transcript is found at Tab 8, *see* ARNOLD's Ex. 5), there was a pregnant pause in the conversation. He then indicated that the plea hearing transcript would be ready within the next 30 days and that I might expect to hear from him again, then.

Conflict, Ineffectiveness and Abandonment.

8. Waiting another 30 days is all well and good, but in that time, I'm fully expecting the following, which perspective only raises conflict to impasse.

A. The present deadline for the Transcript for the trial of ARNOLD and EVANS is 22 September. Should that turn out to be the filing date, the time for the briefs is likely officially to begin. Since the transcript of the plea hearing has been available for order since 20 December 2002 (Docket Entries 1059 and 1060) (9 months), and since the Notice of Appeal was filed on 30 April 2003 (four and half months), and since the motion to withdraw was denied several months ago, my

expectation is low that any additional time will be permitted for submitting the brief as based upon any additional transcript request at this time.

B. That being the case, 30 days from "now" is about three weeks into the [p. 5] six-week time period for the principal briefs. The court may or may not allow additional time, and since my brief was submitted three and a half months ago, again, I'm not counting on a lot of leeway.

C. Additionally, over the past four and a half months, where I've been unable to submit the brief, or anything else, which brief, on its face, also requests Release Pending Appeal, I've been in jail instead of released pending appeal, without even the authority to request Release Pending Appeal, because I've been denied self-representation. Thus, to wait for yet another 30 days just for a maybe to hear back on transcripts, during which time a Motion for Release Pending Appeal, which should have been filed at least in June when my efforts toward that end were rejected, could be filed and results obtained, is unthinkable and unbearable. I shouldn't have to beg for zealous representation. It's supposed to be part of the normal course.

D. Appointed counsel is a very decent person, and for the most part, a caring representative for his clients. As a person, I like him, and I'm comfortable that most feel the same way. But, it's not his butt that's in jail, and the conflict in perspective that he and I have has simply reached an impasse.

9. Since I am the one asserting my defenses, objections and positions, starting at the 11th hour in the trial court and continuing on appeal, rather than appointed [p. 6] counsel, and since I'm "on hold" for yet another 30 days, awaiting transcripts that could (should?) have been requested months ago, as I learned in the first pre-paid call to him that he's accepted, which was last week, 9 September 2003, and since he's filed nothing for me on appeal, despite the fact this court has disallowed his motion to withdraw, which is yet another indication that

there's got to be *something* worth raising on appeal, and since the expected briefing period is within 10 days of starting, the sole conclusion I have is one of ineffective assistance and effective abandonment.

10. Nothing in the recent conversation indicated any change in his perspective first communicated in April, and again in May, that he considers executory "Plea Agreements" as binding once made and simply not alterable or appealable under any circumstances. Illustrative of the conflict of interest already of Record, and exacerbated by this recent conversation, I see *nothing* about the plea hearing that alters the factual insufficiency of the Indictment, the plea, the "agreement," or the Judgment. Thus, I see this matter *very* differently and *very* appealable.

No Basis for Plea or Judgment.

11. For at least the reasons presented in this Affidavit, I challenge the validity of the Indictment, the plea, the enforceability of the "Plea Agreement" and the basis for and substance of the Judgment. Count One alleges no facts in support of [p. 7] the crime it defines. Similarly, the guilty plea has no factual basis (and was not knowing and intelligent). *Bousley v. United States*, 523 U.S. 614 (1998); FED. R. CRIM. P. 11(f)). Consequently, the "Plea Agreement" is unenforceable, and the Judgment is void and properly vacated. Further, because these defenses, objections and positions were not asserted on my behalf during pretrial, allocution or "sentencing" phases, I also include them as basis for ineffective assistance.

Embezzlement (§ 7201) versus Larceny (§ 371 (defrauding)).

12. Even KLEIN didn't commit a Klein conspiracy! *See* ARNOLD's (Fourth) Motion for Release Pending Appeal, Case No. 03-12810-D. The Klein conspiracy (§ 371 (defrauding)) defines larceny by trick. But, there's not one fact asserted in the Indictment or in the "Plea Agreement" that even remotely establishes my, or anyone else's, *acquisition of possession* of anything from either

the Department or the IRS, at any time, by any means, much less by trick or other dishonest means. I've defrauded no one. There's no larceny here. (No embezzlement, either.) Thus, there's simply no factual basis supporting any of Count One, the guilty plea, the "Plea Agreement" or the Judgment.

The Instantaneous Breach of the "Plea Agreement," "Employment" "Taxes" and Debtor's Prison.

13. In addition to the debtor's prison problem, which arises from the criminal [p. 8] charges on "employment" "taxes," *see* ARNOLD's Ex. 2 (pp. 15-18), there's also the very overt fact that the "Plea Agreement" was *supposed* to be based upon Count One *only*. There's not one red cent of "employment" "taxes" anywhere identified in Count One. The *only* counts that mention such figures are Counts Six and Seven. *Cf.* ARNOLD's Ex. 4 (2 App.) Indictment 1-16 (Count One), *with* Ex. 4 (2 App.) Indictment 22-24 (Counts Six and Seven). Thus, even if "employment" "taxes" were subject to criminal enforcement, this "Plea Agreement" breaches itself instantly, by purporting to dismiss everything but Count One, and then by turning right around and including Counts Six and Seven.

14. The "agreement," then, as construed against the party who drafted it, is self-contradicting. It's breached instantly upon signing. Both the "agreement" and the Judgment state that all counts except Count One were dismissed, yet Counts Six and Seven are incorporated into the "agreement."

Wrong Party–Not My "gross business income."

15. While pleading multiple counts and alternative theories may be permissible, pleading "alternative facts" is not. Count One's "facts in the alternative" regarding the "gross *business* income" actually confesses that the "gross income" attributed to me is most definitely *not* mine.

16. The problem is illustrated and encapsulated in five

paragraphs: ¶¶ B.1, [p. 9] B.11, B.15, C.5 and C.14. "FLEMING ... controlled, operated and owned a radio broadcast business ... [which] earned gross business income." ¶ B.1 (p. 2). This business (singular) is alleged to operate under different names, among them AAA Enterprises and Info Distribution. B.11 (p. 5). But, AAA Enterprise is a business trust, EIN 52-6617874, and Info Distribution is a business trust, EIN 52-6617872. In general, the mere existence of an EIN puts the beneficiary on notice that it's a separate fiduciary, with its own "claim of right" to its own "gross income." Further, for there to be at least *two* of such separate entities labeled as *one* "business," the beneficiary's confession of commingling rings from the page. *See also* ¶ B.15 ("The primary purpose of Global was to buy Info Distribution and AAA Enterprises from Jimal.").

17. The lulu, lullapaluzer, whopper of an inconsistency ("facts in the alternative") is this:

> Fleming controlled, owned and operated a ... ***business*** ... under various names ..., which was virtually the exclusive source for broadcast traffic reports to radio and television stations in the metropolitan area and from which ***he*** earned millions of dollars in gross ***business*** income ... from at least 1986 through 1998.

¶ C.5 (p. 9) (emphasis added). ***Whose*** "gross income?"

18. That's the overview. Additional details are these. Count One confesses and recognizes the separate business entities. ¶ B.11, p. 5 ("Entities"). Count One [p. 10] alleges that I control a/the separate entity(ies):

¶¶ B.1 (p. 2) (the *TraffiCenter* earned "gross business income");

B.3 (p. 3) (ARNOLD served as trustee of "FLEMING's" businesses);

B.4 (p. 3) (BLOOMQUIST served as trustee);

B.5 (p. 3) (BOSWORTH was employed by a business

entity controlled and operated by FLEMING; MIG bought the business known as TraffiCenter; MIG employed FLEMING in the operation of this business);

B.6 (p. 4) (trust entities);

B.7 (p. 4) (business entities);

B.8 (p. 4) (KAMISH was employed by one or more business entities controlled and operated by FLEMING, including the TraffiCenter; various employment positions and business entities);

B.11 (p. 5) (TraffiCenter is an "entity" controlled, operated and owned by FLEMING; "TraffiCenter earned gross business income;" the one business operated under different names, which, as identified above, were *not* different names, but different, separate, independent business entities altogether, as confessed three *and* four paragraphs later; hence the beneficiary's confession of commingling);

B.13 (p. 5) (Avalon is a separate entity); [p. 11]

B.14 (p. 5) (Jimal is a separate entity; NOTE: Only three paragraphs previous, AAA Enterprises and Info Distribution were merely separate names for one business, namely TraffiCenter; here each is identified and recognized as a separate business entity);

B.15 (p. 6) (Global is a separate business entity; NOTE: Four paragraphs previous, AAA Enterprises and Info Distribution were merely separate names);

B.16 (p. 6) (Sharuco is a separate business entity);

B.17 (p. 6) (MIG is a separate business entity, one purpose of which was to purchase the business entity known as TraffiCenter);

B.19 (p. 7) (The confessed intent to annihilate the business entities that are trusts; the confession that the *sole* basis for such annihilation *is* the non-recognition, non-respect, of the business entity's fiduciary obligation); and

B.22 (p. 7) ("Employment taxes," thus reinstigation of debtor's prison, but, conveniently, the employer, TraffiCenter, is not identified).

19. But, all of a sudden, these separate entities aren't

really separate entities, after all, by simply recharacterizing them as "sole proprietorships" or nominee entities. ¶¶ C.1 (p. 8); C.2 (p. 8); C.4 (p. 9); C.5 (p. 9); C.6 (p. 9); and C.7 (p. 10).

20. But, even mid-thought, the dream fades back to reality. ¶¶ C.8 (p. 10) (back to the separate existence of the entities, as such, so that they may be sold); C.9 (p. [p. 12] 10) (UBO's identified as non-income producing, and separate and distinct entities from the business activities identified); C.10 (p. 10) (a new separate entity, Consolidated); C.11 (p. 11) (Jimal and TraffiCenter are separate entities, again, and Fleming controls and owns TraffiCenter); C.12 (p. 11) (TraffiCenter, controlled and owned by Fleming, is a separate entity, again, as is Global); C.13 (p. 11) (MIG is a separate entity, as is TraffiCenter, still owned and controlled by Fleming, of course); **C.14 (p. 11) (Why in the world are separate fiduciary reports even *expected* for corporate, trust or partnership income, *if* all the entities are shams, nominees or sole proprietorships? And, since the beneficiary expects that such forms *be* submitted, the beneficiary attributes "gross income" to *each* entity, thus *confessing* its *recognition* of these entities as *separate* fiduciaries. Yet, all "gross income" is simultaneously *mine?*)**; D.4 (p. 12) (separate entities, in particular AAA Enterprises and Info Distribution).

21. In sum, the pleadings, themselves, confess the blatant "claim of right" problem, here, in that they allege throughout that the "gross *business* income" is the entity's (entities). The "facts in the alternative" confess confusion; they do not alter the separate existence of the business entities.

22. Bottom line: none of that "gross *business* income" was or is mine. [p. 13]

The Applicable Rules and Some Supreme Court Opinions.

23. Independent from any substantive defense, objection

or position I have, I'm satisfied that appointed counsel's foundational (definitely well-meaning, but errant) perspective, that "Plea Agreements" are simply not appealable, period, contributed greatly to his failure to assert my 11th hour substantive defenses, objections and positions for and at allocution and sentencing. In addition to FED. R. CRIM. P. 11(f) and 32(e), here are some opinions, available at the time of sentencing, whether published or otherwise electronically available, in which the guilty plea- or "Plea Agreement"-based Judgment was reversed or vacated:

> *Kyllo v. United States*, 533 U.S. 27 (2001) (9th Cir. affirmed; S. Ct. reversed and remanded).
>
> *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (NJ affirmed; S. Ct. reversed).
>
> United States v. Corson (Docket No. 98-2282) (1st Cir.) (not to be cited as authority) <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/1st/982282.html>.
>
> *United States v. Hubbell*, 530 U.S. 27 (2000) (S. Ct. dismissed indictment).
>
> *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (plea agreement; appeal not timely filed; federal habeas relief denied by trial court; 9th Cir. reversed; S. Ct. vacated and remanded, providing the standard to apply).
>
> *Mitchell v. United States*, 526 U.S. 314 (1999) (3d Cir. affirmed, S. Ct. reversed and remanded).
>
> [*United States v. Hyde*, 520 U.S. 670 (1997) (analyzing FED. R. CRIM. P. 32(e) allowing a defendant to withdraw his guilty plea for any fair and

just [p. 14] reason) ("We hold that in such circumstances a defendant may not withdraw his plea unless he shows a 'fair and just reason' under Rule 32(e).").]

Stinson v. United States, 508 U.S. 36 (1993) (11th Cir. affirmed; S. Ct. vacated and remanded).

Doggett v. United States, 505 U.S. 647 (1992) (11th Cir. affirmed; S. Ct. reversed and remanded).

Burns v. United States, 501 U.S. 129 (1991) (DC Cir. affirmed; S. Ct. reversed and remanded).

Braxton v. United States, 500 U.S. 344 (1991) (4th Cir. affirmed; S. Ct. reversed and remanded).

Hughey v. United States, 495 U.S. 411 (1990) (5th Cir. affirmed; S. Ct. reversed and remanded).

Ricketts v. Adamson, 483 U.S. 1 (1987) (state court plea agreement; federal habeas; 9th Cir. reversed; S. Ct. reversed).

Mabry v. Johnson, 467 U.S. 504 (1984) ("A plea bargain standing alone is without constitutional significance; *in itself it is a mere executory agreement* which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.") (emphasis added) (state court conviction set aside; plea agreement; exhaustion of state remedies; federal habeas; 8th Cir. reversed; S. Ct. reversed).

United States v. Morrison, 449 U.S. 361 (1981) (3d Cir. reversed; S. Ct. reversed and remanded).

Blackledge v. Allison, 431 U.S. 63 (1977) (state court plea agreement; federal habeas; trial court dismissed

habeas; 4th Cir. reversed; S. Ct. affirmed).

Santobello v. New York, 404 U.S. 257 (1971) ("This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of [p. 15] guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.") (state court plea agreement; appellate court affirmed; S. Ct. vacated and remanded).

The Agreement and the Trial Court's Instructions.

24. In addition to the preceding item, the "agreement" specifically states the reality that it's not binding on the court, Ex. 3 (2 App.) "Plea Agmnt" 3 (rendering it "executory," nothing but a "joint offer" by the parties, until accepted by the court), and the trial court *specifically stated* that an appeal exists where there is an error of law. Ex. 5 (2 App. Tab 8) (starting 5th page from the last) (16:08-16:09).

Wrong Entity–The "Third Res" is Not My Obligation.

25. I never signed the "Returns" prepared for me by the IRS. *See* Ex. 4 (2 App.) "Returns." They are simply not true or correct, and for me to sign them would be for me to commit perjury.

26. What those "Returns" do is commingle the various separate business entity activity into a wholly separate thing, a thing I call the "third *res*." That "third *res*" didn't exist prior to this litigation. If it still exists, it will cease to exist upon the completion of the final orders from this litigation. It's solely a by-product of this [p. 16] litigation, and it's an entity over which I've *never* agreed to be a fiduciary.

The Beneficiary's Disclaimer.

27. For a business entity to obtain an EIN is for the entity to put the beneficiary on notice of the fiduciary-beneficiary obligation. Acceptance of that relationship and its benefits by the beneficiary is presumed. For the beneficiary to assert criminal charges is to assert recognition of the relationship, but to turn right around and annihilate the very entity(ies) allegedly having a fiduciary obligation is to disclaim all interests arising from that(those) obligation(s). *See* ARNOLD's Ex. 2 (pp. 19-29).

Usury.

28. The "gross *business* income" referred to throughout is not mine. But, if it were, and given that the beneficiary went to so much trouble to include JOYCE FLEMING, my wife, an innocent spouse, *see* IRC § 6015, in this matter, it follows that the proper "tax rate" at which to determine *any* initial distribution amount would be the Married Filing JOINTLY rate. The "returns," *see* ARNOLD's Ex. 4 (2 App.) "Returns," however, charge "tax" at the Married Filing SEPARATELY rate. This hidden interest charge greatly exceeds the lawful interest rates. *See* ARNOLD's Ex. 2 (pp. 3-14). [p. 17]

Valuation versus Payment, and the Payment Mandamus.

Line Item cases versus Bottom Line cases.

29. *Spies v. United States*, 317 U.S. 492 (1943) (a *no return* case) discusses the sanctions gradation in the Code. The gradation distinguishes *line item* cases from *bottom line* cases. A § 7203 case focuses on the "gross income" (or AGI) line item(s). A § 7206 case focuses on the voracity of the line item(s). But, a § 7201 case focuses on the *bottom line*, which is the gravamen "value" at risk of loss element for this form of embezzlement case.

(Underpaid) "(Net) Tax Imposed."

30. What is the bottom line? It's not the "gross income," the "adjusted gross income," or the "taxable income." It's

not even the "(gross) tax imposed," which comes from the initial conversion of "taxable income" into "tax." The *bottom line* is the "(net) tax imposed," which starts with the "(gross) tax imposed" and then considers all applicable credits, payments in particular.

31. The more common term in the opinions is *tax deficiency*. To understand this to be the (underpaid) "(net) tax imposed" is to understand that no § 7201 matter exists without some "value" at risk, which is the underpaid amount, given the proper "(net) tax imposed," which clearly and necessarily includes consideration of all applicable credits, payments in particular. Keeping the term [p. 18] "tax imposed" also preserves the intentional cross references to those provisions throughout the Code that define another "tax imposed."

Valuation and Payment are vastly different cases.

32. Section 7201 contains its own internal gradation. Since all "evading or defeating" cases sound in embezzlement, the question is this: how much certainty in the bottom line is necessary? If *payment* were the sole standard, then the certainty would have to be high, for a *payment* case necessarily involves a sum certain, as should speak for itself. "You owe money." "How much?" "We'll tell you when to stop paying, and if you stop before then, you'll go to jail." Because § 7201 specifically distinguishes *valuation* from *payment*, a *lesser* amount of certainty is tolerated. *That's* the *valuation* case.

33. Even with a relatively uncertain bottom line amount, there must exist a bottom line amount. It must be pled, and it must be proved. Otherwise, the gravamen "value" at risk of loss element for such theft charge doesn't exist. Further, for there to be a *payment* case, that "value" at risk of loss must be a sum certain, which sum certain must be pled and must be proved.

Payment Mandamus.

34. There is no sum certain in this case. There is not even a fiduciary obligation. First, there is no (known)

beneficiary. With an unknown beneficiary, [p. 19] the fiduciary may hold onto any distribution indefinitely. *See* ARNOLD's Ex. 2 (pp. 35-36). To punish someone for what is lawful to do is a flagrant due process violation. *North Carolina v. Pearce*, 395 U.S. 711, 738 (1969). Secondly, since all fiduciaries have been annihilated, all claims are disclaimed as a result. Thirdly, the *sole* amounts identified for sentencing are of the "third *res*," which has no fiduciary. Additionally, even if there were such an obligation, there is not one (underpaid) "(net) tax imposed" for any entity or any individual involved in this matter, much less a sum certain of such "value."

35. In short, this is not a *payment* case, meaning that there is no basis for any mandamus regarding any *payment*. *See* ARNOLD's Ex. 4 (2 App.) Judgment 4.

Ignorance of Law and Mistake of Fact.

36. Whether by larceny or embezzlement, it's impossible to take wrongfully that which one *knows* is his. Because I did not know, until the 11th hour in the original transaction, that any of this had anything to do with a fiduciary obligation, I had zero idea of any other ownership interest or any distribution amount, whether by or to a known or an unknown beneficiary; hence, my allocuted statements to that effect. Thus, even if larceny were a suitable charge, there's no mens rea. *See* ARNOLD's Ex. 2 (pp. 53-57). *See also Morrissette v. United States*, 342 U.S. 246 (1952) (cited in *Cheek v. United States*, 498 U.S. 192, 203 (1991)). [p. 20]

37. Given my ignorance of the law, and the mistake of fact that it produced at the time of my signing the purely executory "agreement," it follows that the "agreement," for the exact same reasons, mistake of fact, is unenforceable.

The "Double Taxation" Scam and Simultaneous Double Jeopardy.

38. Because there is no enforceable plea or "Plea Agreement," double jeopardy protection applies to me.

39. This matter came to light about two months *after* my sentencing, but it's still a matter of ineffective assistance, because it's one more item to be argued on appeal on my behalf, all the more so because it *was* hidden from normal view.

40. For 1996, the beneficiary "taxed" me on 100% of the "gross *business* income," and also "taxed" ARNOLD on another 75% of that exact same "gross *business* income." That's the fraud on the court that is the "double taxation" scam. *See* ARNOLD's First Affidavit, Ex. 7 (ARNOLD's "numerics") and Ex. 4 (2 App.) "Returns" 1 (my "numerics").

41. That "double taxation" becomes simultaneous double jeopardy in this way. The real fiduciaries in interest are the real business entities. For purposes of double jeopardy, those entities are agents for the true owners. Whether or not either one of us *is* an agent for one or more of those entities, we've been charged as such. Thus, as alleged agents for the entities, we, too, become agents for the [p. 21] true owners. By taxing ARNOLD and me, the beneficiary has twice and simultaneously "taxed" the true owners. Since these judgments, each with the payment mandamus, arise from the same case, the same count and the same "gross *business* income," which is neither ARNOLD's nor mine, the true owners are twice subject to loss of property, once through me, and then again through ARNOLD, for the very same offense. And, since these judgments, each with the payment mandamus, occurred "simultaneously," it's impossible to know which of the two "double taxations" occurred first. Thus, double jeopardy protection here necessitates setting aside both Judgments.

Conclusion.

42. In sum, it's impossible to review this information, even in this overview format, and conclude that there is *nothing* meritorious to argue on appeal. I am flabbergasted, *completely* at a loss, as to what the plea hearing transcript has to offer, here, thus, why I need to

wait another 30 days for anything.
43. This Affidavit describes continuing conflict of interest between appointed counsel and myself, which conflict has now reached an impasse, has established abandonment and has confirmed ineffective assistance.
44. Per *Mickens*, this matter is now formally made part of the Record on appeal. [p. 22]

Certificate of Interested Persons.
45. As a housekeeping matter, I adopt and incorporate the Certificate of Interested Persons in ARNOLD's Ex. 2.

Certificate of Service.
46. By my signature below, I certify that I have served, or caused to be served, either by first class mail (certified, return receipt requested) or hand delivery, a copy of this Affidavit on the following:

James A. Hernandez
Hernandez & Hernandez
1905 Atlantic Boulevard
Jacksonville, FL 32207

Susan H. Raab
Assistant United States
Attorneys
Appellate Division
300 North Hogan Street
Suite 700
Jacksonville, FL 32202

Copies also served by regular mail upon the following:

Paul I. Perez, Jr.
United States Attorney
Middle District of Florida
400 North Tampa Street
Suite 3200
Tampa, FL 33602

Sheryl L. Loesch
Clerk of Court
United States District Court
Middle District of Florida
300 North Hogan, Suite 9-150
Jacksonville, FL 32202

Date of Signing: 9-15-2003 /s/ Don Fleming
Don Fleming, in my
FEDERAL CAPACITY as
DONALD C. FLEMING

26 February 2004 Clerk's action–Returning unfiled Fleming's Motion to Redesignate

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

February 26, 2004

Donald C. Fleming (#21483-018)
Jesup FCI
2600 S US HIGHWAY 301
JESUP GA 31599-5676

RE: 03-12283-DD USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

The following action has been taken in the referenced case:

APPELLANT'S PRO SE MOTION TO REDESIGNATE IS RETURNED UNFILED SINCE APPELLANT HAS COUNSEL. A REPRESENTED PARTY CANNOT FILE ANY MOTIONS PRO SE.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nicole Jones (404) 335-6173

MOT-2 (11-2003)

24 February 2004 (Approximate Date) Subject document of immediately preceding Clerk's action (Filestamped document not returned) (*See* First Amended Notice of Appeal–11 Feb 2004)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283-DD

UNITED STATES OF AMERICA,
Plaintiff–Appellee,
v.
DONALD C. FLEMING,
Defendant–Appellant

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

FLEMING'S MOTION TO REDESIGNATE

Fleming moves that his "Response to Counsel's Second Motion to Withdraw" formally be redesignated as "Appellant's Brief," and that the brief submitted with the Second Motion to Withdraw be redesignated as "counsel's brief in support of second motion to withraw," by whatever capitalization or style is proper in the normal course.

[p. 2] Respectfully submitted,

Donald C. Fleming
Jessup FPC
2600 U.S. Highway 301 South
Jessup, Georgia 31599

CERTIFICATE OF SERVICE

By my signature below, I certify that on this the ___ day of February, 2004, I caused to be served a true and correct copy of this motion by certified mail on the following:

Susan H. Raab
Assistant United States Attorneys
Appellate Division
300 North Hogan Street, Suite 700
Jacksonville, FL 32202

Copies also served by regular mail upon the following:

Paul I. Perez, Jr.
United States Attorney
Middle District of Florida
400 North Tampa Street
Suite 3200
Tampa, FL 33602

Sheryl L. Loesch
Clerk of Court
United States District Court
Middle District of Florida
300 North Hogan, Suite 9-150
Jacksonville, FL 32202

_____
Donald C. Fleming

Rule 14(i)(vi)

Additional Essential Information

30 April 2003 Fleming's Notice of Appeal

FILED 2003 APR 30 A 9:10
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
v.	§	Case No. 3:00-cr-262-J-20HTS
	§	
DONALD C. FLEMING	§	

NOTICE OF APPEAL

Notice is hereby given that Don Fleming, a defendant in the above-captioned case, hereby appeals to the United States Court of Appeals for the 11th Circuit from the final order of this Court with respect to him which order "sentences" DONALD C. FLEMING. This final order with respect to him was entered on or not long after 28 April 2003.

/s/ Don Fleming
Don Fleming
c/o 1012 Crestdale Street
Jacksonville [32211]
Florida

1225

1 May 2003 Clerk's transmittal document for Notice of Appeal

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
300 North Hogan Street
Suite 9150
Jacksonville, Florida 32202
(904)549-1900
www.flmd.uscourts.gov

Sheryl L. Loesch
Clerk

Eric A. Hogue
Jacksonville Division Manager

DATE: May 1, 2003
TO: Clerk, U.S. Court of Appeals for the Eleventh Circuit
U.S.D.C. Case No.: 3:00-cr-262-J-20A
Style of Case: UNITED STATES OF AMERICA -vs- DONALD C. FLEMING
U.S.C.A. Case No.:

Enclosed are documents and information relating to an appeal in the above-referenced action. Please acknowledge receipt on the enclosed copy of this letter.

- Honorable Harvey E. Schlesinger, United States District Judge appealed from.

- Appeal filing fee was paid.

- Copy of Notice of Appeal (doc. #1225), certified copy of docket entries, judgment and/or Order appealed from. Opinion was not entered orally.

- Court Reporter: Evelyn Alderman, Marie Splane and Deanne Ferreira-Kozar, Official Court Reporters and Accurate Reporters.

SHERYL L. LOESCH, CLERK
By: Sandra Gatz, Deputy Clerk

Enclosure(s)

7 October 2003 Notice to Fleming of counsel's second motion to withdraw

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

October 07, 2003

Donald C. Fleming (#21483-018)
Jesup FCI
2600 S US HIGHWAY 301
JESUP GA 31599-5676

RE: 03-12283-DD USA v. Donald C. Fleming
DC DKT NO.: 00-00262 CR-J-20-HTS

Your court-appointed attorney in this direct criminal appeal has filed with this court and served on you a motion to withdraw as counsel, together with a brief in support thereof. For your convenience, another copy of your court-appointed attorney's motion and brief are enclosed.

Within thirty (30) days from the date of this letter, you have the right to respond to the motion pursuant to Anders v. California, 386 U.S. 738 (1967). You may present any contentions (arguments) you choose which you believe show that your appeal has merit and that this court should hear your case. Your response may be either

handwritten or typed. You should specify all factual and legal bases (grounds) for reversal of your conviction or sentence, including any legal authorities and citations in support thereof which are available to you. Four (4) copies of your response should be filed with this court, one copy should be served on your court appointed attorney, and one copy should be served on the United States Attorney.

Upon receipt of your response (or after 30 days if you do not respond) your attorney's motion and brief and any response received from you will be submitted to the court. After consideration of these filings and review of the record of proceedings in the district court, this court may grant withdrawal of counsel and dismiss the appeal as frivolous, or if it finds any legal points of arguable merit, either deny counsel leave to withdraw or appoint counsel of the court's choice to further brief the appeal.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Elora Jackson (404) 335-6176

Enclosures

APPT-3 (12-2002)

7 October 2003 Counsel's motion and *Anders* brief

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
OCT 03 2003
THOMAS K. KAHN, CLERK

U.S. COURT OF APPEALS
RECEIVED CLERK
OCT 06 2003
ATLANTA, GA.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
ATLANTA, GEORGIA

UNITED STATES OF AMERICA

CASE NO.:03-12283-DD

vs.

DONALD C. FLEMING

SECOND MOTION TO WITHDRAW

The undersigned attorney in this case moves this Honorable Court to allow the undersigned attorney to withdraw from this case. The reason for this request is as follows:

1. A brief has been submitted pursuant to Anders v. State, 386 U.S. 738 (1967).

For the above stated reason the undersigned attorney it is requested that the undersigned counsel be allowed to withdraw.

I HEREBY CERTIFY that a copy of the foregoing pleading has been served upon ***AUSA A. William Mackie, and to Donald C. Fleming, #21483-018, c/o Federal Prison Camp, Jesup, Georgia 31599***, by U.S. Mail this 3rd day of October, 2003.

Very Respectfully Submitted,

/s/ James A. Hernandez
James A. Hernandez, Esquire
Florida Bar No.: 0871303
1905 Atlantic Boulevard
Jacksonville, Florida 32207
(904) 396-7466
(904 396-9733 (facsimile)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12283-D

UNITED STATES,
Plaintiff–Appellee,
v.
DONALD C. FLEMING,
Defendant–Appellant.

Appeal from the United States District Court
for the Middle District of Florida

BRIEF OF APPELLANT

James A. Hernandez
Bar No. 0871303
Counsel for Defendant-Appellant
1905 Atlantic Blvd.
Jacksonville, Florida 32207
Telephone: 904-396-7466
Fax: 904-396-9733

[p. i]

No. 03-12283-D
U.S. v. Donald C. Fleming

CERTIFICATE OF INTERESTED PERSONS

The following is a list of those who have an interest in the outcome of this case:

1. James A. Hernandez, Counsel for Appelant
2. Will Mackie, Assistant United States Attorney
3. Donald C. Fleming, Defendant-Appellant
4. Honorable Harvey Schlesinger, United States District Judge
5. Susan H. Raab, Assistant United States Attorney, Appellate Counsel for the United States.
6. Paul Perez, United States Attorney
7. Honorable Howard T. Synder, United States

Magistrate Judge

There is no identifiable victim in this case.
C-1 of 1

[p. ii]

STATEMENT REGARDING ORAL ARGUMENT

The facts and legal argument are adequately set forth in the appellant's brief and therefore oral argument is not requested.

[p. iii]

PRELIMINARY STATEMENT

The undersigned counsel has thoroughly reviewed record on appeal, including the plea and sentence transcripts. Based on this diligent review, counsel is unable to argue that the district court committed reversible error and that there exists meritorious grounds for an appeal. Pursuant to counsel's obligations under *Anders v. California*, 386 U.S. 738 (1967), counsel suggests that the issues presented arguable, however, for the reasons cited are without merit.

[p. 4]

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STATEMENT OF JURISDICTION

Title 28 U.S.C. § 1291 provides that the court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States except where a direct review may be had in the Supreme Court.

The United States District Court, Middle District of

Florida, Jacksonville Division, had jurisdiction pursuant to Title 18 U.S.C. § 3231.

[p. 6]

This appeal was timely filed within ten days of the entry of judgment rendered in this cause.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Fleming certifies that the size and style of type in this brief is 12 point Courier.

[p. 7]

STATEMENT OF THE ISSUES

I.

WHETHER DEFENDANT'S PLEA OF GUILTY TO COUNT ONE OF THE INDICTMENT WAS KNOWINGLY AND VOLUNTARILY MADE.

II.

WHETHER FEDERAL RULE OF CRIMINAL PROCEDURE 11 WAS SUBSTANTIALLY FOLLOWED DURING THE PLEA COLLOQUY.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

The Defendant was named in a nineteen-count indictment returned by a federal grand jury in the Middle District of Florida, on June 27, 2000. [R2 1-16]. The defendant was charged in counts 1,2,3,4,5,6,7,8,9,10 and 15. The offenses were conspiracy to Defraud the IRS, Income Tax Evasion, Failure to file Income Tax Return and Obstruction of Justice. [R2 1-16]. The defendant pled guilty pursuant to a written plea agreement to count one the conspiracy to defraud the IRS which stipulates that the Government will move to dismiss counts 2 to 10 and 15 of the indictment [R 1060 1-16]. The defendant entered a plea on December 20, 2002 while representing himself pro se before the district court. [R 1060 1-16]

[p. 8]

Defendant filed a timely notice of appeal on April 2003. [R1225-1]. Defendant is currently serving his sentence at FCI, Jesup, Georgia.

(ii) Statement of the Facts

On September 26, 2000, Defendant entered a plea of guilty before the Honorable Thomas B. McCoun III, United States Magistrate Judge, to count one of the indictment, charging him with knowingly and intentionally possessing with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of Title 21, United States

(iii) Standard of Review

The Court of Appeals conducts a two-question "harmless error" analysis when a Defendant alleges that a district court has failed to comply with Rule 11 of the Federal Rules of Criminal Procedure:

(1) Did the district court in fact vary from procedures required by Rule 11, and

(2) if so, did such variance affect substantial rights of the appellant?

U. S. v. Bejarano, 2001 WL 467938, (11th Cir. (Fla.) 2001) citing *United States v. Johnson*, 1 F.3d 296, 297 (5th Cir. 1993).

SUMMARY OF THE ARGUMENT

Counsel suggests that the two issues raised are arguable, however, for the reasons cited, are without merit.

[p. 9]

ARGUMENTS

I.

WHETHER DEFENDANT'S PLEA OF GUILTY

TO COUNT ONE OF THE SUPERSEDING INDICTMENT WAS KNOWINGLY AND VOLUNTARILY MADE.

In *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), the United States Supreme Court held that it was plain error for an Alabama trial judge to accept a plea of guilty, without an affirmative showing on the record that Mr. Boykin's plea to five counts of robbery was intelligent and voluntarily made.

Federal constitutional rights are involved when a defendant enters a plea of guilty in a state criminal proceeding. These rights include the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront and cross-examine one's accusers. The Court cannot presume a waiver of these important constitutional rights from a silent record.

Rule 11 of the Federal Rules of Criminal Procedure is designed to assist the district judge in determining whether the defendant's plea of guilty is voluntary. The rule is intended to produce a record, at the time the plea is entered, of the factors relevant to determining whether the plea is voluntary. In entering a plea of guilty, a defendant waives important constitutional rights, including the privilege [p. 10] against self-incrimination, right to trial by jury and right to confront and cross-examine his accusers. If a defendant's plea of guilty is not knowing and voluntary, it has been obtained in violation of due process and is void. A defendant's plea cannot be truly voluntary unless the defendant understands the law in relation to the facts. *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

In addition to directing the district judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 directs the judge to satisfy herself that there is a factual basis for defendant's plea.

Defendant was advised by the court of important constitutional rights that he would waive if he entered a

plea of guilty [R 304-23, 29-49]. These rights included the right to have an attorney and the assistance of counsel at every stage of the proceeding, the right to trial by jury, the right to confront and cross-examine his accusers, the right to compulsory process or subpoenas to obtain witnesses evidence to present at trial and the privilege against self-incrimination. [R1304-29-49]. Defendant acknowledged that he understood the constitutional rights he would waive by pleading guilty. [R1304-57-58]

The court asked Defendant if any threats, coercion or [p. 11] improper pressure of any kind been applied to get him to plead guilty. He responded in the negative. [R1304-66-67]

The prosecutor recited the facts that the government would prove beyond a reasonable doubt if the case proceeded to trial. [R1304-58-60] Defendant acknowledged that the facts recited by the prosecutor were true. [R1304-60]

Accordingly, the record below clearly reflects that the Defendant was fully informed and knowing of his constitutional rights, and the effect of their waiver by his plea of guilty. The record also clearly supports the conclusion that waiver was voluntary. Thus, there is no merit to a claim of an unknowing and/or involuntary waiver of the Defendant's rights.

II.
WHETHER FEDERAL RULE OF CRIMINAL PROCEDURE 11 SUBSTANTIALLY FOLLOWED DURING PLEA COLLOQUY.

Federal Rule of Criminal Procedure 11 provides:

> (c) Advice of Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect or any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, [p. 12] when applicable, that the court may also order the defendant to make restitution to any victim of the offense; ....

In the case at bar, the district court advised Defendant of the nature of the charge to which he entered a plea of guilty. [R1304-45-65] The Defendant advised the court that no force, intimidation or threats were applied to induce him to plead guilty. [R1304-66-67] He acknowledged that he understood the nature of the charge he was pleading and to penalty. [R1304-64-67] The court substantially complied with Rule 11. [p. 13]

CONCLUSION

Pursuant to *Anders v. State of California*, 386 U.S. 738 (1967), the undersigned counsel requests this Court's permission to withdraw as counsel of record and to afford the Defendant the opportunity, if he so desires, to supplement this appeal raising any issue which he contends have merit. Counsel certifies that he has forwarded the Defendant a copy of the brief, together with a letter advising him of his right to supplement the brief, if he so chooses.

Respectfully submitted,

/s/ James A. Hernandez
James A. Hernandez
Fla. Bar No. 0871303
1905 Atlantic Blvd.

Jacksonville, Florida 32207
(904) 396-7466/ Fax: (904) 396-9733

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing have been furnished to Susan H. Raab 300 North Hogan Street, Suite 700, Jacksonville, Florida 32202, by United States Postal Service this 3 Oct 03. I also certify that on 28 Sep 03 a copy of this brief was sent via PDF Format to the 11th Cir. Court of Appeals.

/s/ James A. Hernandez
James A. Hernandez

8 October 2003 Clerk's transmittal document regarding transcripts (and updated case number)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
300 North Hogan Street
Suite 9-150
Jacksonville, Florida 32202
(904) 549-1900
www.flmd.uscourts.gov

Sheryl L. Loesch, Clerk
Eric A. Hogue, Jacksonville Division Manager

DATE:	October 8, 2003
TO:	Clerk, U.S. Court of Appeals for the Eleventh Circuit
U.S.D.C. Case No.:	3:00-cr-262-J-20A
Style of Case:	UNITED STATES OF AMERICA -vs- DONALD C. FLEMING
U.S.C.A. Case No.:	**03-12283-DD**

Enclosed are documents and information relating to an

appeal in the above-referenced action. Please acknowledge receipt on the enclosed copy of this letter.

- Complete Record on Appeal:
  5 Volumes of Pleadings
  24 Volumes of Transcript
  1 Presentence Investigation Reports

- Certificate of Readiness with certified copies of indexed District Court Docket Sheet [11 th Circuit Only]

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Enclosure(s)

8 October 2003 Clerk's transmittal document regarding Certificate of Readiness

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MIDDLE DISTRICT OF FLORIDA
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Jacksonville, Florida 32202
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Sheryl L. Loesch
Clerk

Eric A, Hogue
Jacksonville Division Manager

October 8, 2003

CERTIFICATE OF READINESS
OF RECORD ON APPEAL

U.S. District Court Case Number: 3:00-cr-262-J-20A
Style of Case: United States of America -vs-

DONALD C. FLEMING
U.S.C.A. Case Number: 03-12283-DD

Pursuant to Federal Rules of Appellate procedure 11(c), the Clerk of the United States District Court for the Middle District of Florida hereby certifies that the record is complete for purposes of this appeal. The record, including the transcript of parts thereof designated for inclusion and all necessary exhibits, consists of:

Complete Record on Appeal:
- 5 Volume(s) of Pleadings
- 24 Volume(s) of Transcript
- 1 PSI [Sealed]

SHERYL L. LOESCH, CLERK
By: Sandra Gatz, Deputy Clerk

11 February 2004 Fleming's First Amended Notice of Appeal

FILED 2004 FEB 11 P 12:39 [?]
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES	§	
OF AMERICA	§	
	§	
v.	§	Case No. 3:00-cr-262-J-
	§	20HTS
DONALD C. FLEMING	§	

FIRST AMENDED NOTICE OF APPEAL

Under the general rule of nunc pro tunc application of amended pleadings, notice is hereby given that Don Fleming, a defendant in the above-captioned case, hereby appeals to the United States Court of Appeals for the 11th Circuit from the final order of this Court with respect to him which order "sentences" DONALD C. FLEMING. This final order with respect to him was entered on or not long after 28 April 2003.

DONALD C. FLEMING INTENDS TO PURSUE HIS DIRECT APPEAL PRO SE, WITHOUT ANY ATTORNEYS, WITHOUT ANY RIGHT TO REPRESENTATION, AND BY MEANS OF SELF-REPRESENTATION.

/s/ Don Fleming
Don Fleming
c/o 1012 Crestdale Street
Jacksonville [32211]
Florida

Certificate of Service

By my signature below, I certify that on this the 9th day of February, 2004, I have served a copy of this document on all parties directly affected by this document, with a complimentary copy to the Eleventh Circuit.

/s/ Don Fleming
Don Fleming

1362

11 February 2004 Clerk's transmittal document regarding Fleming's First Amended Notice of Appeal

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Office of the Clerk
300 North Hogan Street
Suite 9-150
Jacksonville, Florida 32202
(904) 549-1900
www.flmd.uscourts.gov

Sheryl L. Loesch, Clerk
Eric A. Hogue, Jacksonville Division Manager

DATE: February 11, 2004
TO: Clerk, U.S. Court of Appeals for the Eleventh Circuit
U.S.D.C. Case No.: 3:00-cr-262-J-20HTS
Style of Case: UNITED STATES OF AMERICA
-vs-
DONALD C. FLEMING
U.S.C.A. Case No.: 03-122$3-DD

Enclosed are documents and information relating to an appeal in the above-referenced action. Please acknowledge receipt on the enclosed copy of this letter.

- Honorable Harvey E. Schlesinger, United States District Judge appealed from.
- Appeal filing fee not applicable.
- Copy of FIRST AMENDED Notice of Appeal (doc. #1362), certified copy of docket entries, judgment and/or Order appealed from. Opinion was not entered orally.

- Dates of other appeals: 4/30103

SHERYL L. LOESCH, CLERK
By: Sandra Gatz, Deputy Clerk

Enclosure(s)

Numerics Numerics conjured for Fleming

Donald C. Fleming:
SSN: 077-34-4838

	Calendar Year		
	1993	1994	1995
Income	$638,702	$685,693	$628,114
Expenses	($471,021)	($504,357)	($407,378)
Net Income	$167,681	$181,336	$220,736
Income tax	$51,249	$56,255	$71,286
Self-employment tax	$11,057	$12,370	$13,501
Total tax	$62,306	$68,625	$84,787
Force Back-up Withholding	($13,960)	($45,299)	($56,825)
Tax Liability (Form 1040)	$48,346	$23,326	$27,962
Employment taxes			
Form 941	$67,252	$91,332	$59,958
Form 940	$7,030	$5,960	$1,241
Total tax Due	**$122,628**	**$120,618**	**$89,161**

	1996	Total
Income	$554,390	$2,506,899
Expenses	($444,783)	($1,827,539)
Net Income	$109,607	$679,360
Income tax	$27,897	$206,687
Self-employment tax	$10,710	$47,638
Total tax	$38,607	$254,325
Force Back-up Withholding	($19,145)	($135,229)
Tax Liability (Form 1040)	$19,462	$119,096
Employment taxes		
Form 941	$70,627	$289,169
Form 940	$5,777	$20,008
Total tax Due	**$95,866**	**$428,273**

Numerics conjured for Arnold

Al Arnold:

	4/1/96 to 12/31/96	1/1/97 to 12/31/97	1/1/98 to 10/5/98
Income	$415,793	$547,194	$626,254
Expenses	($333,587)	($422,732)	($327,832)
Net Income	$82,206	$124,462	$298,422
Total tax	$28,955	$44,467	$108,703
Force Back-up With-holding	$14,359	$0	$0
Tax Liability (Form 1040)	$14,596	$44,467	$108,703
Employment taxes due			
2Q96 (941)	$22,408		
2Q96 (940)	$1,380		
3Q96 (941)	$17,585		
3Q96 (940)	$1,015		
4Q96 (941)	$6,929		
4Q96 (940)	$503		
Total tax Due	**$64,416**	**$44,467**	**$108,703**

	Total
Income	$1,589,241
Expenses	($1,084,151)
Net Income	$505,090
Total tax	$182,125
Force Back-up With-holding	($14,359)
Tax Liability (Form 1040)	$167,766
Employment taxes due	
2Q96 (941)	$22,408
2Q96 (940)	$1,380
3Q96 (941)	$17,585
3Q96 (940)	$1,015
4Q96 (941)	$6,929
4Q96 (940)	$503
Total tax Due	**$217,586**

(3)
Supreme Court, U.S.
FILED
03154 1 MAR 17 2004
OFFICE OF THE CLERK

Nos. _____

In The
Supreme Court of the United States

In re DONALD C. FLEMING and WILLIAM ALLEN ARNOLD,
Defendants-Appellants-Petitioners,
PRO SE, NO ATTORNEYS,
ASSERTING A RIGHT OF
SELF-REPRESENTATION

DONALD C. FLEMING and WILLIAM ALLEN ARNOLD,
Defendants-Appellants-Petitioners,
PRO SE, NO ATTORNEYS,
ASSERTING A RIGHT OF
SELF-REPRESENTATION
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee-Respondent

ON PETITION FOR WRIT OF MANDAMUS AND
ON RULE 11 PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX B (WILLIAM ALLEN ARNOLD)

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FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
OCT 14 2003
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12810-D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM ALLEN ARNOLD,
JOSEPH WELBURN EVANS,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

O R D E R:

Appellant Arnold's "(Fourth) Motion for Release Pending Appeal" is DENIED.

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

Motion The motion ruled on

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12810-D

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM ALLEN ARNOLD,
Defendant-Appellant

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

APPELLANT ARNOLD'S (FOURTH) MOTION FOR RELEASE PENDING APPEAL

(Lack of subject matter jurisdiction may be raised at any time.)

History of this Motion

By motions not labeled as distinctly as might have been preferred (the First Motion, and then the First Amended Motion, for Relief in Equity), Arnold sought Release Pending Appeal. Those were denied, with the note that relief must first be sought in the trial court. Embarrassingly, overlooking the obvious difference with the relief requested in the Motion for Stay in the trial court and the relief sought [p. 2] here, a third effort, through reconsideration, was initiated, ending with the very same result: denied, start with the trial court.

By motion (Docket Entry 1267), filed 30 June 2003, Arnold sought Release Pending Appeal in the trial court. That motion is attached as Exhibit 8. The trial court denied the relief. That order is attached as Exhibit 9.

See Arnold's First Exhibit List. Exhibit 7 is the "Numerics for Arnold," originally submitted with Arnold's First Affidavit.

Exhibit 10–The Instructions for this case

Exhibit 11–18 U.S.C. § 371, Beneficiary's[1] Standard Proposed Instructions

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[1] Plaintiff, appellee, the unknown real party in interest.

Exhibit 12–IRC § 7212, Beneficiary's Standard Proposed Instructions

Exhibit 13–IRC § 7201, Beneficiary's Standard Proposed Instructions

See also <http://www.usdoj.gov/tax/readingroom/criminal/taxc23.htm> (DOJ discussion of § 371) ("*DOJ-§ 371*"); <http://www.usdoj.gov/tax/readingroom/criminal/taxc17.htm> (same, § 7212) ("*DOJ-§ 7212*"); <http://www.usdoj.gov/tax/readingroom/criminal/taxc08.htm> (same, § 7201) ("*DOJ-§ 7201*").

Motion for Release Pending Appeal

ARNOLD moves that this court grant him release pending appeal. [p. 3]

Discussion

Preamble. Count One, Ex. 4 (2 App.) Indictment 1-16 ("Count One"), the only count submitted to the advisory panel, charges a Klein conspiracy, a rather narrow and specific crime. So narrow, in fact, that KLEIN, himself, didn't commit a Klein conspiracy! Embezzlement and larceny are quite different, which is but one of the fatal flaws in the Klein conspiracy theory from its inception.

Also, there's a flagrant "claim of right" problem. The "gross *business* income" is neither FLEMING's nor ARNOLD's, but rather some entity's, or group of entities'. Further, Count One focuses entirely on *FLEMING's* "taxes," but the Judgment sentences ARNOLD on *ARNOLD's* "taxes," a charge asserted *nowhere* in the entire Indictment! Additionally, Count One seeks reinstatement of debtor's prison, by seeking criminal sanctions based upon "employment" "taxes."

Point: Does Count One allege the Klein conspiracy it defines?

Standard on Review. The sum total of all challenges in the trial court to this Indictment, by or on behalf of all the defendants in this case, is at least 61, with a few more

related motions for procedural matters. But, even if *everything* in this motion qualifies as an objection raised for the first time on appeal, this Judgment is still instantly vacated. Count One does not allege the crime defined; thus, it confers no subject matter jurisdiction.

> [p. 4] We review arguments raised for the first time on appeal for plain error. *See United States v. Swatzie*, 228 F.3d 1278, 1281 (11th Cir. 2000), *cert. denied*, 533 U.S. 953 (2001). We will find plain error only where (1) there is an error in the district court's determination; (2) the error is plain or obvious; (3) the error affects the defendant's substantial rights in that it was prejudicial and not harmless; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Chisholm*, 73 F.3d 304, 307 (11th Cir. 1996).

United States v. Clark, 274 F.3d 1325, 1326 (11th Cir. 2001).

Allowing Count One to go to trial, much less sentencing anyone based upon it, is error in the district court's determination (of subject matter jurisdiction). The difference between embezzlement and larceny is plain and obvious. Being deprived of liberty and property for a crime not even alleged, much less proved, affects the defendant's substantial rights in that such is prejudicial. The error not only seriously affects the fairness, integrity or public reputation of judicial proceedings in *this* proceeding, but also gives pause for reflection of the Klein conspiracies charged for the past 50 years. (Klein indictment filed 17 Sep 1954).

Klein Conspiracy. Here's the key Indictment language:

> to defraud the United States Department of the Treasury and the Internal Revenue Service (IRS) ... for the purpose of impeding, impairing, defeating, and

> otherwise obstructing the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of federal taxes ... through deceit, craft, trickery and dishonest means.

Count One (p. 2 ¶ A). The Instructions are virtually identical. Ex. 10 (pp. 6-7). Also, *cf.* Ex. 10 (pp. 7-10), *with* Ex. 11 (thus, the Indictment and the Instructions [p. 5] look to § 371 for the Klein conspiracy; thus, not § 7201, and not § 7212).

No Return? No Case. Before addressing the fatal foundational problems with the Klein conspiracy theory, there's a "no evidence" factual matter that sets the stage well. *False return* and *no return* cases differ greatly. The *Klein* court addressed this distinction directly and from the outset. "Mere failure to disclose income would not be sufficient to show the crime charged of defrauding the United States under 18 U.S.C. § 371." *United States v. Klein*, 247 F.2d 908, 916 (2d Cir.1957), *cert. denied*, 335 U.S. 924 (1958) (false return). This is a *no return* case, as Count One boldly confesses. "FLEMING failed to file federal individual, corporate, trust or partnership income tax returns ...." Count One (p. 11 ¶ C.14). In sum, since, on this fact alone, Count One blatantly confesses itself insufficient for a Klein conspiracy, the panel's opinion cannot stand. *United States v. Dansker*, 537 F.2d 40, 50-51 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

Occam's Razor. "Income tax" matters have been a source of wonder, confusion and self-imposed disaster for Americans since 1913. Yet, such matters are relatively straightforward. In general, the typical criminal "income tax" case concerns embezzlement (§ 7201), with penalty enhancement for the "corrupt" (§ 7212 (omnibus), added to the Code in 1954). But, the crime charged by § 371 (defrauding) is larceny by trick, a charge that is completely inapposite.

[p. 6] **Embezzlement (§ 7201) Versus Larceny (§ 371 (defrauding))—A Mere Matter of Possession.** Theft takes various forms. Embezzlement differs from larceny differs from obtaining property by false pretense. In the embezzlement case, possession is acquired rightfully, but *continued* wrongfully.

> In accordance with generally accepted law, a defendant commits embezzlement when, being in lawful possession of the property of another, he fraudulently appropriates or converts such property to his own use with the intent permanently to deprive. [footnote omitted] [*See also Moore v. United States*, 160 U.S. 268 (1895).] The misappropriation cannot constitute larceny because there is no trespassory taking from the possession of another. [footnote omitted] Indeed, it was to fill this gap in the law of larceny that the offense of embezzlement, a creature only of statute [footnote omitted] found its way into Anglo-American law. ...
>
> [Embezzlement is typically consolidated into the theft statutes, and] although not always mentioned by name[, it] is still viewed essentially as a fraudulent conversion of the property of another by a person in lawful possession.

CHARLES C. TORCIA, 3 WHARTON'S CRIMINAL LAW §§ 383, 408 (15th ed. 1995) (pp. 463-65, 511) ("WHARTON"). In the larceny case, it's the act of *acquisition* of possession, itself, that is wrongful.

> At common law, larceny is the trespassory taking and carrying away of the personal property of another with the intent permanently to deprive. [footnote omitted] It is an offense against the right of property or possession. [footnote omitted] ...

> [Wharton distinguishes larceny "by trespassory taking" and larceny "by trick."] [A] larceny by trick was committed when a defendant, with intent permanently to deprive, obtained the personal property of another by fraudulently inducing such other person to part with its possession. ... [p. 7]
>
> [Development of the law produced another form of theft: obtaining property by false pretenses.] The offense of obtaining property by false pretenses was committed when a defendant, with the intent permanently to deprive, obtained the personal property of another by fraudulently inducing such other person to part with the possession of and title to his property. ...
>
> [Theft offenses typically are consolidated by statute.] Ordinarily, however, the substantive elements of the offenses have not been changed.

WHARTON §§ 343, 382 at 347-54 & 460. Larceny by trick focuses on possession of the property; larceny by false pretense, on the title to the property. *Bell v. United States*, 462 U.S. 356, 358-360 (1983).

> If the person who receives the property acquires possession rather than mere custody, his subsequent decision to keep the property for himself may constitute embezzlement but, because there is no taking from the possession of another, it cannot constitute larceny.

WHARTON § 358 at 416.

Klein theory is fatally flawed. Despite the multitudinous false statements and returns in *Klein*, KLEIN no more committed a Klein conspiracy than the man in the moon! The same reality exists here.

Where the mountain stream represents the typical

"income tax" case's transaction flow (wrongful *continued possession*), the spawning salmon represents the Klein conspiracy theory's transaction flow (wrongful *acquisition of possession*). In short, the Klein conspiracy theory is exactly "bass ackwards." The operative theory for the Klein conspiracy (§ 371 (defrauding)) charges that the [p. 8] accused *acquires possession* (of that narrow scope of property owned by the United States or an "agency thereof") by trick. Yet, the factual reality in the "income tax" case is that *possession* (of property acquired by transactions with persons regularly quite distinct from the United States and any "agency thereof") has long since already occurred, *quite* lawfully, and the *continued possession* is the wrongful act. In sum, a Klein conspiracy charges larceny by trick, where "income tax" cases sound in embezzlement (§ 7201).

Klein Conspiracy Elements. The elements for § 371 (defrauding) are these: (1) {agreement by two or more persons} to defraud the United States or an agency thereof; (2) knowing and voluntary participation; and (3) an overt act. *United States v. Falcone*, 311 U.S. 205, 210 (1940); *United States v. Cure*, 804 F.2d 625, 628 (11th Cir. 1986). Since defrauding the United States, per se, is nowhere alleged, we refine to this: (1) {} to defraud an "agency thereof." From Count One, we refine to this: (1) {} to defraud the Department of the Treasury and the IRS.

> It is true that the words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. One would not class robbery or burglary among frauds.

Hammerschmidt v. United States, 265, U.S. 182, 188

(1924). Thus, we refine: (1) {} to wrong the Department and the IRS in their property rights by dishonest [p. 9] methods or schemes.

Wronged how? Context is abundantly clear! Between what's excluded, theft by violence, robbery and burglary, and what's included, deprivation of something of value by trick, deceit, chicane or overreaching, § 371 (defrauding) sounds *a lot* like larceny by false pretense or trick. *Accord United States v. Caldwell*, 989 F.2d 1056, 1060 (9th Cir. 1993) (jury instructions deficient without "deceitful or dishonest means"). In short, we're talking about *acquisition of possession* of someone else's property (rights) as a direct result of the "fraud."

Whose property rights? It is inconceivable that a beneficiary *ever* lacks the capacity to sue or be sued. *See*, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 871 (rev. 2d ed. 1995) ("BOGERT"). Yet, neither the IRS, *Diversified Metal Products, Inc. v. T-Bow Co. Trust*, 96-2 USTC ¶ 50,437 (CCH) (D. Idaho 1996) (p. 85,462 n. 3), citing *Blackmar v. Guerre*, 342 U.S. 512, 514 (1952), nor its Department, *Ruble v. United States Gov't, Dep't of Treasury, Internal Revenue Serv.*, 159 F. Supp. 2d 1381, 1382-83 (N.D. Ga. 2001), has the capacity to sue or be sued. Thus, we're not even talking about Department or IRS property rights, but those of some other, unknown party ("agency thereof?") that *does* have capacity to be a beneficiary, an undisclosed principal for which the collection agency and its department are the [p. 10] agents. Thus, the Klein conspiracy looks to the principal-agent language.

> To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.

Hammerschmidt at 188.

The operative part of element (1) is this: {} to defraud the Department of the Treasury and the IRS ... through deceit, craft, trickery and dishonest means. This defines larceny by deceit or trick. And, the federal common law, i.e., not any statute, hodgepodges § 7201 and § 7212 together to conjure the added mens rea component, which is this: for the purpose of impeding, impairing, defeating, and otherwise obstructing the lawful functions of the IRS in the ascertainment, computation, assessment, and collection of federal taxes. Thus, a Klein conspiracy charges a larceny by trick offense that is rather narrowly defined, in part by the limited scope of property, and in part by the additional mens rea element of having the purpose of obstructing or impeding the lawful function of the IRS. *Cf.* § 7212.

Some Examples. Those who (1) knowingly sell defective computers to the CID at the full price, with the intent of adversely affecting the lawful function of the CID, or who (2) through constructive eviction (noise, aroma, etc.), and with the intent to do so, interrupt the normal activities of the Collections Department but still charge the full agreed lease amount, at least qualify for a Klein conspiracy [p. 11] charge. Contrast these. (3) Where the defense contractor charges $1,200 for a screwdriver, that act of deceit or trickery produces *acquisition of possession* of property from the DoD, but where's the intent to mess over the IRS? And (4) if an employee of an "agency thereof" falsifies a travel voucher or travel expense report, again, there's an *acquisition of possession* of property via deceit, but where's the intent to mess over the IRS? In sum, it's possible to picture fact patterns that actually satisfy the Klein conspiracy definition, but it *takes* the imagination to get there, not this case, not even *Klein!*

Conclusion.

Count One *does not* allege the Klein conspiracy (larceny by trick) it defines. Nowhere does it allege that

ownership of one red cent of property or "value" identified was first in the possession of the Department or the IRS. Nowhere does it allege that FLEMING or ARNOLD or anyone else *acquired possession* of anything *from* either the Department or the IRS, by any means, much less by trick or any other dishonest means. There is no "defrauding" here. This is not a larceny case. Count One is insufficient on its face. It alleges no crime, confers no subject matter jurisdiction and is properly dismissed. It should *never* have been tried, and ARNOLD should be released pending appeal. [p. 12]

Point: Where ARNOLD is charged solely as a conspirator, is it error to sentence him as a principal?

Sentencing: A Ramshackle Spectacle! What the Indictment says and what the Judgment is based upon are two *entirely* different cases. "Claim of right" issues shout from the page! Count One says nothing about anyone's "taxes" but *FLEMING's*. (Even Count Five charges ARNOLD with respect to *FLEMING's* "taxes.") Thus, there can be *one and only one* bill, *FLEMING's!* How in the *world*, then, does *ARNOLD* end up with *his own* "tax" bill? If ARNOLD is a conspirator for FLEMING's "taxes," why do ARNOLD's "numerics" include *two year's "taxes" not included in FLEMING's?! Cf.* Ex. 4 (2 App.) "Returns" 1, *with* Ex. 7 (FLEMING's "numerics" cover 1993-1996; ARNOLD's, 1996-1998). Thus, ARNOLD was *not* sentenced as a *conspirator* regarding *FLEMING's* "taxes," but rather as a *principal* for the entity's (entities') "taxes," a charge *nowhere* found in the entire Indictment! Since the sentence imposed against ARNOLD has *nothing* whatsoever to do with *FLEMING's* "taxes," does that not *confess* that the "gross *business* income" is the *entity's*, not *FLEMING's?!* Does that not *confess* that the entire case was about the business *entities*, not *FLEMING?*

FLEMING is the alleged "responsible party" for at least one of a group of business *entities* operated by so-called "tax protestors." But, for there to be "responsible party," there must first be a liable entity. So, *where* is the liable [p. 13] entity? None is found in the Indictment or the trial transcript. Thus, no *tax deficiency* [(underpaid) "(net) tax imposed"] was ever pled or proved, not for any entity or any individual. This speaks for itself, since the Indictment nowhere mentions expenses, much less payments. (*No return* and *false return* cases differ greatly.) It takes getting to *sentencing* even to find such figures. But such figures are not merely a matter for sentencing. The existence of a "value" at risk of loss is a gravamen element for any theft charge. Essential elements of the case in chief must be pled and proved. Where is the liable entity?

Then, there's the "double taxation" scam. As identified in ARNOLD's First Affidavit, the beneficiary "taxed" ARNOLD for *another 75%* of the *same* "gross *business* income" for 1996. This creates its own conspiracy to commit larceny by trick issue, as well as a rather unique simultaneous double jeopardy problem.

Still another problem that arises from confusion about § 7201 is the distinction between *valuation* cases and *payment* cases. Section 7201 contains its own internal gradation, one that distinguishes the sum certain *payment* cases from the uncertain amount *valuation* cases. Without this distinction between *payment* and *valuation*, the *valuation* case wouldn't be possible to prosecute. So, where this Judgment issues a *mandamus* for a *payment* case never even pled, much less proved, Ex. 1 p. 4 (ARNOLD's Judgment), it ventures into unauthorized territory. [p. 14] Additionally, the mandamus is quite vague as to whose "taxes" we're even talking about, *FLEMING's*, per Count One, or *ARNOLD's*, per Ex. 7?

Conclusion. At sentencing, ARNOLD was charged, tried and convicted on charges *nowhere* found in the entirety of the Indictment, much less Count One!

Debtor's Prison. Regarding the fatal taint from any criminal charge based upon "employment" "taxes," *see* Ex. 7, there is no criminal liability because there is no caption. WHARTON § 365.

Conclusion and Relief Requested

Count One defines a Klein conspiracy (larceny by trick), but wholly and completely fails to allege any such criminal violation. Further, it facially confesses, among other things, (a) the inapplicability of *Klein* (no return; no larceny), (b) the absence of any "value" at risk of loss (no *tax deficiency*) and (c) debtor's prison ("employment" "taxes"). And, since ARNOLD was sentenced for crimes never even charged, the due process violations scream from the page!

This appeal is clearly *not* "for purposes of delay." ARNOLD is not a flight risk, nor even a remote threat to himself or to society. And, *there is no case against him!* (There's no case against *anyone* from this Indictment!)

Therefore, ARNOLD requests that this court order all appropriate parties to release him pending conclusion of this appeal.

[p. 15]

Respectfully submitted,

William A. Arnold, III,
in my FEDERAL CAPACITY as
WILLIAM ALLEN ARNOLD
4342 Forest Road
Columbus, GA 31907

Certificate of Service

By my signature below, I certify that I have served, or caused to be served, either by first class mail (certified,

return receipt requested) or hand delivery, a true and correct copy of this Motion, and Exhibits 7 to 13, on the following:

Susan H. Raab
Tamra Phipps
Assistant United States
Attorneys
Appellate Division
300 North Hogan Street
Suite 700
Jacksonville, FL 32202

Paul I. Perez, Jr.
United States Attorney
Middle District of Florida
400 North Tampa Street
Suite 3200
Tampa, FL 33602

True and correct copies of the Motion also served on the following:

Sheryl L. Loesch
Clerk of Court
United States District Court
Middle District of Florida
300 North Hogan, Suite 9-150
Jacksonville, FL 32202

Defense counsel of Record

WILLIAM ALLEN ARNOLD

Rule 14(i)(ii)

Additional relevant opinions, orders, and etc.

28 May 2003 Final Judgment at trial (p. 7 under separate cover)

AO 245B (3/01 Rev. locally 9/01)
Sheet 1 - Judgment in a Criminal Case

FILED 2003 MAY 28 A 11:31
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA
v.
WILLIAM ALLEN ARNOLD

CASE NO. 3:00-cr-262-J-20HTS
Defendant's Attorney: Pro Se

THE DEFENDANT:
__ pleaded guilty to Count .
__ pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on Count One of the Indictment after a plea of not guilty.

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

TITLE & SECTION	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT NUMBER(S)
18 U.S.C. 371	Conspiracy to defraud the United States Department of Treasury for the purpose of impeding or obstructing the Internal Revenue Service.	November 1999	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

__ The defendant has been found not guilty on count(s)
__ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 256-70-3609
Defendant's Date of Birth: December 24, 1946
Date of Imposition of Sentence: May 28, 2003
Defendant's USM No.: 21415-018
Defendant's Mailing Address: 4342 Forest Rd,
Columbus, GA 31907

Defendant's Residence Address: 4342 Forest Rd.
Columbus, GA 31907

CERTIFIED A TRUE COPY
SHERYL L LOESCH. CLERK /s/ Harvey Schlesinger
U. S. DISTRICT COURT HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

By: /s/
Deputy Clerk

DATE: May 28 2003
1248

AO 245B (3/01 Rev. locally 9/01)
Sheet 2 - Imprisonment
Defendant: WILLIAM ALLEN ARNOLD
Case No.: 3:00-cr-262-J-20HTS Judgment-Page 2 of 6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **12 months**.

_ The court makes the following recommendations to the Bureau of Prisons:

_ The defendant is remanded to the custody of the United States Marshal.
_ The defendant shall surrender to the United States Marshal for this district.
_ at _ a.m./p.m. on _
_ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
X before 2 p.m. on **Friday, June 27, 2003**
_ as notified by the United States Marshal.
_ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

[blank]

Defendant delivered on ___ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By:_____
Deputy Marshal

AO 245B (3/01 Rev. locally 9/01)
Sheet 3 - Supervised Release
Defendant: WILLIAM ALLEN ARNOLD
Case No.: 3:00-cr-262-J-20HTS Judgment-Page 3 of 6

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **two (2) years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime, and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instruction of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall

permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

AO 245B (3/01 Rev. locally 9/01)
Sheet 3a - Supervised Release
Defendant: WILLIAM ALLEN ARNOLD
Case No.: 3:00-cr-262-J-20HTS Judgment-Page 4 of 6

SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

__ The defendant shall participate in the Home Detention program for a period of __. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation

Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

_ The defendant shall participate as directed in an in-patient or out-patient program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which will include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

_ The defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

_ If deported by the Immigration and Naturalization Service, the Defendant shall not re-enter the United

States unless allowed to do so legally.

_ Defendant shall provide the Probation Officer access to any requested financial information.

_ Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or obligating for any major purchases without approval of the Probation Officer.

_ Defendant shall perform _ hours of community service as directed by the Probation Officer.

_ Defendant shall submit to a search of his/her person, residence, place of business, or vehicle conducted by the Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

X Defendant shall cooperate with the Internal Revenue Service to pay all outstanding taxes, interest and penalites.

AO 245B (3/01 Rev locally 9/01)
Sheet 5, Part A - Criminal Monetary Penalties
Defendant: WILLIAM ALLEN ARNOLD
Case No.: 3:00-cr-262-J-20HTS Judgment-Page 5 of 6

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The defendant shall pay interest on any fine or restitution of more than

$2,500 unless the fine or restitution is paid in full before the fifteenth day after the date of Judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

	Assessment	Fine	Total Restitution
Totals:	$100.00		

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $.

_ The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

_ The interest requirement is waived.

_ The interest requirement is modified as follows:

RESTITUTION

_ The determination of restitution is deferred until _. An Amended Judgment in a Criminal Case will be entered after such a determination. The U.S. Attorneys Office is directed to provide the necessary information to the court.

_ The defendant shall make restitution to the following victims in the amounts listed below:

_ Restitution is ordered jointly and severally with:

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$		

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While in

custody the defendant is directed to participate in the Bureau of Prisons' Financial Responsibility Program if eligible and upon release from custody the defendant shall adhere to a payment schedule as determined by the Probation Office.

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While in custody the defendant is directed to participate in the Bureau of Prisons' Financial Responsibility Program if eligible and upon release from custody the defendant shall make nominal payments as determined by the Probation Office.

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability until this obligation is satisfied. While on supervision the defendant shall adhere to a payment schedule as determined by the Probation Office.

_ The defendant is ordered to begin payment immediately and continue to make payment to the best of his/her ability. While on supervision the defendant shall make nominal payments as determined by the Probation Office.

_ The defendant is ordered to immediately pay this obligation in full.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column above.

The amount of loss and the amount of restitution ordered will be the same unless, pursuant to 18 U. S.C. §3664(f)(3)(B), the court orders nominal payments and this is reflected on Sheet 6, Statement of Reasons.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) non-federal restitution; (3) federal restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties.

Payment of the total criminal monetary penalties shall be due as follows:

I. X In full
   A. X due immediately
   B. _ on or before ___.

II. _ In installments
   A. _ monthly in installments of $ over a period of _ months, to commence _ days after date of this judgment.
   B. _ in installments of $ over a period of _ to commence _ days after the date of this judgment.

Any payment ordered under Part II, must comply with 18 U.S.C. §3572, 18 U.S.C. §3664(n), and include a provision under 18 U.S.C. §3664(k) in which defendant must notify the court of any material changes in defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. §3664(f)(3)(A): [blank]

In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive

credit for all payments previously made toward any criminal monetary penalties imposed.

_ The defendant shall forfeit the defendant's interest in the following property to the United States: [blank]

If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the court.

8 June 2003 Order–Denying (mislabeled and thus properly construed as)motion for release pending appeal

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
JUN -8 2003
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12810-D

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM ALLEN ARNOLD,
JOSEPH WELBURN EVANS,

Defendants-Appellants

On Appeal from the United States District Court for the Middle District of Florida

O R D E R:

Appellant Arnold's "First Motion for Relief in Equity," which seeks to stay his surrender date, is therefore construed as a motion for release pending appeal. Appellant has also filed a "First Amended Motion for Relief in Equity," which seeks the same relief.

The Court notes that there is no indication in Appellant's motions or in the District Court's docket sheet that Appellant filed a motion for release in the District Court prior to filing his motion with this Court as is required by Fed.R.App.P. 9. Accordingly, Appellant's motion is DENIED WITHOUT PREJUDICE TO RENEWAL subject to Appellant['s] filing a motion for release in the District Court and the District Court's denial of that motion.

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE

11 August 2003 Order–Trial court's denial of Arnold's motion for release pending appeal

FILED
2003 AUG 11
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES
OF AMERICA
v. **Case No.: 3:00-cr-262-J-20HTS**
WILLIAM ALLEN ARNOLD
_____/

ORDER

Before the Court is Defendant, William Allen Arnold's First Motion for Release Pending Appeal. (Doc. No. 1267, filed on June 30, 2003). This Court finds:

(1) that the Defendant is not likely to flee or to pose a danger to the safety of any other person or to the community if released;

(2) that the Defendant's appeal is for the purpose of delay;

(3) that the appeal does not raise a substantial question of law or fact that is likely to result in reversal of conviction, an order for a new trial of all counts on which imprisonment has been imposed, a sentence that does not include a term of imprisonment, or a reduced sentence.

Therefore, the Motion is **DENIED**.

DONE AND ENTERED at Jacksonville, Florida, this 8th day of August, 2003.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies to:
William Allen Arnold, pro se
A. William Mackie, AUSA
Garry Randolph, Courtroom Deputy
Law Clerk

1295

30 June 2003 Motion for release pending appeal ruled on by immediately preceding order. (For the Affidavit and Numerics, see Rule 14(i)(vi) section, *infra.*)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA	§	
v.	§	Case No. 3:00-cr-262-J-20HTS
DONALD C. FLEMING, et al.	§	

ARNOLD'S FIRST MOTION FOR RELEASE PENDING APPEAL

History of ths Motion

During the sentencing proceedings for Arnold, Arnold made a verbal motion for a stay of proceedings, which the court denied. Docket Sheet Entries 1227, 1236.

Arnold requested release pending appeal relief from the appellate court, which relief has been denied. Because a motion for stay of proceedings and a motion for release pending appeal are not requesting the same relief, Arnold has not yet requested release pending appeal relief from this trial court.

Motion

While preserving all his objections, defenses and positions with respect to the Judgement entered regarding him, Fleming moves that this court grant him release pending appeal.

Basis

New evidence. The "double dipping" financial scheme used by the plaintiff against at least Fleming and

Arnold, by which scheme the numerics conjured in this matter were greatly exaggerated, has only recently been discovered.

As shown in the attached Affidavit and Exhibit, the numerics used against Arnold are anything but competent. In particular, the plaintiff has used the *same* pool of assets [p. 2] as the basis for the *separate and distinct* "tax imposed" amounts for at least these Don Fleming and Arnold That is *not* "joint liability." It's "double taxation," "double dipping."

The numerics in this case have had nothing to do with the applicable IRC provisions from the beginning. The numerics arise, in part, from perverting and corrupting claims on business entities into claims on individuals, and not even at the liability level, but at the "gross income" level, with the end result being that these numerics multiply the actual amounts involved and *grossly* exaggerate the asserted claims. In general, these numerics are completely irrelevant, in part, because there was no evidence satisfying the "tax imposed" element of § 7201 ever presented at trial, not for any business entity and not for any individual.

Based on the recently discovered fraud upon this court perpetrated by the plaintiff, in particular as regards the numerics used for purposes of Arnold's sentencing, Arnold requests that this court release him from the present voluntary surrender provision and grant him release pending appeal, generally.

Additionally, Arnold is not a flight risk or a danger to the community, as already acknowledged by the voluntary release provision.

Arnold's appeal is not for the purpose of delay. It raises substantial questions of both fact and law, and he reasonably expects reversal, remand, establishing new law or modifying existing law, or a reduced sentence.

A final thought. It is typical that one seek a "new trial" based upon the type, kind and nature of the evidence newly discovered here. The problem with a "new trial" at this stage for Arnold is that ut would be

conducted under the "current standards." Since Arnold objects to numerous aspects of the "current standards," both procedural and substantive, from the Indictment forward, by which the § 7201 cases are conducted, [p. 3] based upon the horrific example of the problem exemplified in this particular case, it is genuinely his expectation that if this matter is not reversed outright, thus saving this trial court that trial time (which may sound like BS, but it's not), that at least he will have a "new trial" by new and more equitable standards, and that others who may find themselves in similar stages of learning the hard way what this "federal income tax system" is all about, will also at least have new standards by which to evaluate and conduct their defenses.

Relief Requested

Arnold respectfully requests that this court grant him release pending appeal, per such conditions as this court may require.

Respectfully submitted,

William A. Arnold, III
4342 Forrest Road
Columbus, Georgia [31907]

Certificate of Service

By my signature below, I certify that I have served a true and correct copy of this Motion (the Affidavit and the Exhibit ("Numerics for Arnold") have already been served under separate cover) by first class mail or hand delivery as follows:

A. William Mackie
Assistant United States Attorney
600 North Hogan Street, Suite 700
Jacksonville, Florida 32202

_____
William A. Arnold, III

Rule 14(i)(iii)

Rehearing orders, opinions, etc.

4 December 2003 Order–Denying Second Motion to Reconsider. (The first motion to reconsider addressed the mislabeled motions identified *supra*.)

FILED
U.S. COURT OF APPEALS ELEVENTH CIRCUIT
DEC 04 2003
THOMAS K. KAHN CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-12810-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM ALLEN ARNOLD,
JOSEPH WELBURN EVANS,

Defendants-Appellants

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: CARNES and HULL, Circuit Judges.
BY THE COURT:

Appellant Arnold's "Second Motion to Reconsider" is DENIED.

6 November 2003 (Approximate Date) Motion for reconsideration ruled on by immediately preceding order.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12810-DD
(without prejudice)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM ALLEN ARNOLD,
Defendant-Appellant

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

APPELLANT ARNOLD'S SECOND MOTION TO RECONSIDER

History of this Motion

The Motion up for reconsideration is ARNOLD's (Fourth) Motion for Release Pending appeal, denied (without opinion, under the original case number) as of 16 October 2003. [p. 2]

Motion

ARNOLD moves that this court reconsider its ruling on ARNOLD's (Fourth) Motion for Release Pending Appeal.

Discussion

Without retyping it all here, but simply by incorporating it, ARNOLD reasserts his motion for release pending appeal.

Since ARNOLD is asking this court to review 50 years of Klein conspiracy activity, this motion intends primarily to preserve the reconsideration time period in anticipation that such additional time will allow review of ARNOLD's Brief, which also is here incorporated, generally, with emphasis focused on Points 1-4.

Standard on Review. Raised in FLEMING's Brief is the discussion from *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002), which addresses further the questions on where and how *United States v. Cotton*, 535 U.S. 625 (2002), applies where the question is whether the indictment charges an offense. The defects in Count One are "jurisdictional" defects, per *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), *cert. denied*, 459 U.S. 1040 (1982), and per *Peter*. With that issue resolved that way, it simplifies the timing question of this particular objection to the Indictment, namely that Count One charges "defrauding," i.e., larceny (by trick), not embezzlement, because lack of subject matter jurisdiction [p. 3] may be raised at any time.

No Crime Alleged. What does *defraud* mean? Per the common law canon, it means larceny, which has various forms, one of which is trespassory and another of which is trickery. What the court in *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993), diplomatically pointed out is that the trespassory form of "defrauding" was not applicable in the "income tax" setting. They did so by striking down advisory panel instructions that did not include some form of the "by deceit or trick" language (an essential element of larceny by trick). What ARNOLD and FLEMING are saying is that *no form* of "defrauding" (larceny) applies where the de facto question sounds in wrongful *continued* possession, rather than in wrongful *acquisition* of possession. This is borne out by Count One, which alleges no facts of wrongful *acquisition* of anything, tangible or intangible, by anyone, at any time, period. Further, since § 371 (defrauding) modifies the

common law by focusing specifically on property (rights) of the United States, it matters greatly that there exists no property of the United States, at all, subject to even the risk of loss to anyone named in this Indictment by wrongful *acquisition*, by any means, much less by trick. In short, there is no "defrauding" alleged, generally, nor is there any "defrauding of the United States" alleged, specifically, in this Indictment. For this reason, the trial court never had subject matter [p. 4] jurisdiction over Count One.

No Crime Defined. The fact that the Klein conspiracy language doesn't even define a statutory crime only supports the conclusion that the trial court lacked subject matter jurisdiction over Count One.

Relief Requested

Since the Judgment is void, and since Count One is properly dismissed, ARNOLD requests that this court reconsider its initial ruling denying his release pending appeal, and, upon reconsideration, order, at the soonest moment humanly possible, the warden to release ARNOLD.

Respectfully submitted,

William A. Arnold, III
In my FEDERAL CAPACITY as
WILLIAM ALLEN ARNOLD
4342 Forrest Road
Columbus, GA 31907

Certificate of Service

By my signature below, I certify that on this the ____ day of _____, 2003, I have served, or caused to be served, by first class mail (certified mail, return receipt requested) or hand delivery, a true and correct copy of this Motion on the following: [p. 5]

Susan H. Raab
Tamra Phipps
Assistant United States
Attorneys
Appellate Division
300 North Hogan Street
Suite 700
Jacksonville, FL 32202

Gerald S. Bettman
Blackstone Building
Suite 1027
233 East Bay Street
Jacksonville, FL 32202

True and correct copies by first class mail have also been served on the following:

Paul I. Perez, Jr.
United States Attorney
Middle District of Florida
400 North Tampa Street
Suite 3200
Tampa, FL 33602

Sheryl L. Loesch
Clerk of Court
United States District Court
Middle District of Florida
300 North Hogan, Suite 9-150
Jacksonville, FL 32202

Defense counsel of Record of the
related cases on appeal

_____
WILLIAM ALLEN ARNOLD

CERTIFICATE OF MAILING

In order that the court have consistently legible documents, I have the originals typed/printed offsite and mailed to me. The original of this was mailed to me over a week ago, and it has not yet arrived. This original was overnighted to me on Monday, 3 November 2003. The deadline for this motion is Thursday, 6 November 2003. I have placed this signed original with this additional Certificate of Mailing into the mail at this federal correctional facility on the _____ day of November, 2003, and have instructed my sister to mail the copies as of Tuesday, 4 November 2003.

_____
WILLIAM ALLEN ARNOLD

Rule 14(i)(vi)

Additional Essential Information

15 October 2003 Notice of briefing deadline

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

October 15, 2003

Gerald S. Bettman
Attorney at Law
233 East Bay Street #1207
Jacksonville FL 32202

RE: 03-12810-DD USA v. William Allen Arnold
DC DKT NO.: 00-00262 CR-3-J-20HTS

Please be advised that pursuant to 11th Cir. R. 21-1, APPELLANT'S BRIEF AND RECORD EXCERPTS ARE DUE TO BE SERVED AND FILED WITHIN FORTY (40) DAYS FROM October 9, 2003.

The above date is the date the record was deemed completed and filed, on the date the court reporter filed the transcript with the district court, as provided by 11th Cir. R. 12-1.

THIS IS THE ONLY NOTICE YOU WILL RECEIVE CONCERNING THE DUE DATE FOR FILING BRIEFS. See Fed.R.App.P. 28, 30, 31 and 32, and the corresponding circuit rules, for further information on preparing briefs and record excerpts. If you have not

entered your appearance in this appeal, please not that the clerk may not accept your **motions or other filings** . See 11th Cir. R. 46-1(d). Appearance forms are available on the court's Web site at www.ca11.uscourts.gov. Motions for extension of time to file a brief are frowned upon by the court.

In addition to providing the required number of paper copies of briefs, all parties (except pro se parties) are required, additionally, to provide briefs in electronic format as described in 11th Cir. R. 31-5 and the enclosed instructions. Electronic briefs must be in Adobe Acrobat® PDF file format. The electronic brief must be completely contained in one PDF file, i.e., cover page through and including the certificate of service. The address wrapper accompanying this letter contains counsel's individual identification number (User ID) for electronic brief uploading. When uploading a brief for the first time, you will be prompted to create a password known only by you for all future uploads.

Sincerely,
THOMAS K. KAHN, Clerk
Reply To: Nicole Jones (404) 335-6176

Encl.

BR-1 (12-2002)

30 June 2003 Arnold's Affidavit on appeal
6 November 2003 Arnold's First Amended Affidavit

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 03-12810-D

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

WILLIAM ALLEN ARNOLD,
Defendant-Appellant

On appeal from the trial court, the
UNITED STATES DISTRICT COURT,
for the MIDDLE DISTRICT OF FLORIDA
Transaction No. 3:00-cr-262-J-20HTS

APPELLANT ARNOLD'S
FIRST AMENDED AFFIDAVIT

STATE OF GEORGIA §
COUNTY OF MUSCOGEE §

I, William A. Arnold, III, in my FEDERAL CAPACITY as WILLIAM ALLEN ARNOLD, pursuant to 28 U.S.C. § 1746, do hereby depose and declare (or certify, verify or state), under the penalty of perjury, as may be defined by the law recognized by this forum, the following: [p. 2]

1. I am William A. Arnold, III, a Natural Born citizen and resident of the State of Georgia, domiciled in the County of Muscogee, recognized for purposes of this matter in my FEDERAL CAPACITY as WILLIAM ALLEN ARNOLD.
2. I am at least 21 years of age. I have personal knowledge of these facts, which facts are true and correct, and I am competent to make this Affidavit.

What's different?

3. All facts are the same. This amends the paragraph numbers from here forward and includes the reference to Exhibit 7 ("Numerics for Arnold") in the immediately following item.

The Exhibit–"Numerics for Arnold"

4. Attached is a true and correct copy of the numerics presented to me on or about 30 April 2003. It is marked for identification as, and referred in the brief as, "Numerics for Arnold." It is also referred to as Exhibit 7.

5. It is a one-page document summarizing the numerics used against me for purposes of sentencing.

Timing regarding this Exhibit.

6. I remember the timing, because this was the first day scheduled for my [p. 3] sentencing, which date was postponed for a month.
7. I remember asking myself, "What is all this?" I had not seen these figures, and certainly not in this form, personalized for me as it is, before this sheet was handed to me on 30 April 2003.
8. None of the numerics or figures or amounts, individually or collectively, were presented during the trial.

The actual meaning of "joint liability" as used in this matter.

9. I was told by the IRS Agents and by the US Attorney present, that these figures represented "income" for which I and Don Fleming (DONALD C. FLEMING) were to be held "jointly liable."
10. Joint liability is one thing. What's happening here is completely another. What "joint liability" has turned out to mean is that *one* pool of figures has been used as the basis for *multiple* claims, rather than one claim considered as "joint and several liability" among multiple people. In other words, with this one set of figures, *multiple and separate* claims have been made against various defendants in this case.
11. Specifically, I was told that the $415,793 "income" amount for 1996 was the "income" for which DONALD C. FLEMING and I were "jointly liable."
12. To make very clear, by way of example, what I'm trying to describe here, [p. 4] there's this. Let's say that the sum total of "gross income" involved for *all* parties, i.e., from the *business*, was $400,000. And, let's say that the "(gross) tax imposed" on the *business* was $30,000. I would expect a "joint and several claim" to look like this: DONALD C.

FLEMING, jointly and severally liable for $30,000; WILLIAM ALLEN ARNOLD, jointly and severally liable for $30,000; DEFENDANT XYZ, jointly and severally liable for $30,000.

"Commingled Trust *Res* Kiting."

13. But, that's not at all what's going on here. What's going on *here* is this: FLEMING shall include $400,000 in *his* "gross income," which will produce a "tax imposed" figure calculated at a Married Filing SEPARATELY rate. ARNOLD shall include that *same* $400,000 in *his* "gross income," which will produce *another* "tax imposed" figure, calculated at some rate or other. DEFENDANT XYZ shall include the *same* $400,000 in *his* "gross income," which will produce still a *third* "tax imposed," calculated at some rate or other.
14. This is the "commingled trust *res* kiting" described in the brief in the Double Jeopardy Point.
15. Thus, this $415,793 has turned out to be used as basis for at least two [p. 5] *separate* charges. Fleming was charged at the Married Filing SEPARATELY rate. I was not charged at that rate, or so it would at first appear, but I was charged *separately*, based on this exact *same* pool of figures.
16. Let me describe this another way. The *business* income attributed to FLEMING for 1996 is $554,390. The amount attributed to me is $415,793. The business *did not make* $970,183! If these commingled figures reflect any modicum of reality, the business made $554,390, *all* of which was attributed to Fleming as *his* "gross income," and *another* 75% of that *same business* income was attributed to me as *my* "gross income." THAT IS NOT JOINT AND SEVERAL LIABILITY. THAT IS "COMMINGLED TRUST *RES* KITING," pure and simple.

The Investigation is new and is continuing.

17. It is still under investigation as to how many others

have been charged as "jointly liable," actually meaning *separately and multiply* liable, for this *same* (business) "income."

18. It is still under investigation as to how many others have been charged as "jointly liable," meaning *separately and multiply* liable, for the other two Fiduciary Years shown in this "Numerics for Arnold" sheet. [p. 6]
19. It is still under investigation how the "expenses" were distributed multiply, if at all, as well as how the "forced withholding" was distributed multiply, if at all. For example, it would appear that where I got (another) 75% of the "income," attributed also to me was (another) 75% of the "expenses."
20. JOYCE FLEMING will confirm that during the return to her (and DONALD C. FLEMING) of some 46 boxes of documents, the person returning those boxes said that the "pertinent information material to the case" has not been returned, but that the documents returned were for her use for her "taxes," and that there is no intention of anyone's returning those "material" documents. So, this newly developed study by these defendants may take a while, and we may not have all the evidence that is available in this matter.

Irrelevance for trial *and* sentencing.

21. The figures in this exhibit in no way represent or summarize the evidence presented at trial. There was no evidence of "gross income" for me, or of "net income," "taxable income," or "tax imposed," regarding me, or any one else for that matter, presented at trial.
22. In response to receipt of these figures, I immediately filed my second Affidavit, filestamped 1 May 2003, in the trial court Record, Docket Sheet [p. 7] entry 1232, entered 2 May 2003, which asserted my objections to all of these figures.
23. Also, and further, since these figures are so clearly

identified with and to *me*, these figures have nothing to do with any (additional) alleged fiduciary liability of FLEMING, which was and is the sole issue tried. Thus, these figures confess themselves as being irrelevant on their face for any trial or sentencing purpose in this case, as regards me or anyone else. This trial was not about *my* "income." It was about FLEMING's. And, *his* "income" has been multiplied by at least that next additional 75%, as seen in these "Numerics for Arnold."

Formal Request for Board of Inquiry.

24. While we contemplate what we'll do with this newly discovered evidence, I formally request that a Board of Inquiry be established to investigate the malicious prosecutorial conduct exhibited in this case and the fraud upon the court that has resulted

_____
WILLIAM ALLEN ARNOLD
Declarant

Date of signing: _____

[p. 8]

Certificate of Service

By my signature below, I certify that I have served, or caused to be served, either by first class mail (certified, return receipt requested) or hand delivery, a copy of this Affidavit, with Exhibit 7, on the following:

Susan H. Raab
Tamra Phipps
Assistant United States Attorneys
Appellate Division
300 North Hogan Street
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Jacksonville, FL 32202

Paul I. Perez, Jr.
United States Attorney
Middle District of Florida
400 North Tampa Street
Suite 3200
Tampa, FL 33602

Sheryl L. Loesch, Clerk of Court
United States District Court
Middle District of Florida
300 North Hogan, Suite 9-150
Jacksonville, FL 32202

WILLIAM ALLEN ARNOLD

Numerics Numerics conjured for Fleming

Donald C. Fleming:
SSN: 077-34-4838

	Calendar Year		
	1993	1994	1995
Income	$638,702	$685,693	$628,114
Expenses	($471,021)	($504,357)	($407,378)
Net Income	$167,681	$181,336	$220,736
Income tax	$51,249	$56,255	$71,286
Self-employment tax	$11,057	$12,370	$13,501
Total tax	$62,306	$68,625	$84,787
Force Back-up Withholding	($13,960)	($45,299)	($56,825)
Tax Liability (Form 1040)	$48,346	$23,326	$27,962
Employment taxes			
Form 941	$67,252	$91,332	$59,958
Form 940	$7,030	$5,960	$1,241
Total tax Due	**$122,628**	**$120,618**	**$89,161**

	1996	Total
Income	$554,390	$2,506,899
Expenses	($444,783)	($1,827,539)
Net Income	$109,607	$679,360
Income tax	$27,897	$206,687
Self-employment tax	$10,710	$47,638
Total tax	$38,607	$254,325
Force Back-up Withholding	($19,145)	($135,229)
Tax Liability (Form 1040)	$19,462	$119,096
Employment taxes		
Form 941	$70,627	$289,169
Form 940	$5,777	$20,008
Total tax Due	**$95,866**	**$428,273**

Numerics conjured for Arnold

Al Arnold:

	4/1/96 to 12/31/96	1/1/97 to 12/31/97	1/1/98 to 10/5/98
Income	$415,793	$547,194	$626,254
Expenses	($333,587)	($422,732)	($327,832)
Net Income	$82,206	$124,462	$298,422
Total tax	$28,955	$44,467	$108,703
Force Back-up With-holding	$14,359	$0	$0
Tax Liability (Form 1040)	$14,596	$44,467	$108,703
Employment taxes due			
2Q96 (941)	$22,408		
2Q96 (940)	$1,380		
3Q96 (941)	$17,585		
3Q96 (940)	$1,015		
4Q96 (941)	$6,929		
4Q96 (940)	$503		
Total tax Due	**$64,416**	**$44,467**	**$108,703**

	Total
Income	$1,589,241
Expenses	($1,084,151)
Net Income	$505,090
Total tax Force Back-up With-holding	$182,125 ($14,359)
Tax Liability (Form 1040)	$167,766
Employment taxes due	
2Q96 (941)	$22,408
2Q96 (940)	$1,380
3Q96 (941)	$17,585
3Q96 (940)	$1,015
4Q96 (941)	$6,929
4Q96 (940)	$503
Total tax Due	**$217,586**